

REPORTS
AND
CASES
OF
LAW:

Argued and adjudged in the COURTS of LAW, at
WESTMINSTER.

In the time of the late
QUEEN ELIZABETH,

From the 18th. to the 33th. year of her Raign.

Collected by a Learned Professor of the LAW,
WILLIAM LEONARD, Esq; Then of the
Honourable Society of GRAYS-INNE.

Published by *Will. Hughes* of *Grays-Inne*, Esq;

*With Alphabeticall Tables of the Names of the Cases, and of the Matters contained
in the BOOK.*

L O N D O N,

Printed by *Tho. Roycroft*, for *Nath. Ekins*, and are
to be sold at his Shop at the Gunn in *S. Pauls-Church-*
yard, 1658.



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LONDON
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TO THE R E A D E R.

Courteous Reader,

THese Cases were Collected and taken in the French Tongue, by *William Leonard* Esquire, sometimes of the Honourable Society of *Grays-Inne*; a Learned Professor and Practiser of the Common Law, in the time of the Raigh of the late Queen *Elizabeth*: One Copy of some of these Cases (many years past) came into the hands of Sir *Robert Hitcham* Knight, afterwards Serjeant at Law; Another Copy of other of these Cases came then into the hands of *Humphrey Davenport* Serjeant at Law; afterwards Sir *Humphrey Davenport* Knight, late Lord chief Baron of the Court of *Exchequer*; Both which sayd learned persons approved of them, and made use of them in the course of their severall Practise. Some other Copies of some of these Cases are now dispersed abroad, and are in the hands of divers Practisers and Students of the Law, vvho make the like use of them. The Originals themselves of all these Cases (amongst many others of the said Mr. *Leonard*s collecting) all of them under his own hand-writing, are now in my hands, having been delivered to me by a vvorthy Gent. of the sayd Society of *Grays-Inne*, vvho had them out of the Library, sometimes belonging to the sayd Mr. *Leonard*. These Cases having been lately, truly and carefully Translated by me out of the Original French Copy into English, have since the Translation thereof, been perused and approved of by many Eminent Professors of the Law. Wherefore I finding that the same do contain many excellent Matters and Points of Law, vvhich have not heretofore been Printed, or published, do here offer the same unto thy Judgment upon a serious consideration, hoping they may be of some use and benefit to thee, in the like course of thy study and practice of L A W.

*From my Study at Grays Inne,
Novemb. 20th. 1658.*

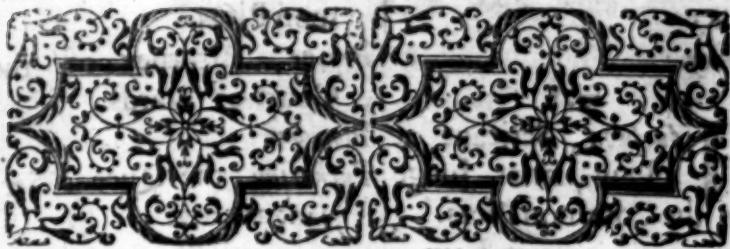
Will. Hughes.

R E A D E R. T O T H E

Common Reader

THese Cases were Collected and taken in the French Tongue by William Lewis Esquire, sometimes of the Honourable Society of Gentlemen; a Learned Professor and Practitioner of the Common Law, in the time of the Reign of the late Queen Mary: One Copy of some of these Cases (many years past) came into the hands of Sir Robert Farnham Knight, afterwards Sergeant at Law; Another Copy of some of these Cases came then into the hands of Humphrey Davenport Sergeant at Law; afterwards Sir Humphrey Denham Knight, late Lord Chief Baron of the Court of Exchequer; Both which said learned persons approved of them, and made use of them in the course of their several Practices. Some other Copies of some of these Cases are now dispersed abroad, and are in the hands of divers Practitioners and Students of the Law, who make the like use of them. The Originals themselves of all these Cases (amongst many others of the said Mr. Lewis collecting) all of them under his own hand-writing, are now in my hands, having been delivered to me by a worthy Gentleman of the Society of Gentlemen, who had them out of the Library sometimes belonging to the said Mr. Lewis. These Cases having been lately, truly and exactly Translated by me out of the Original French Copy into English, have since the Translation thereof been printed and approved of by many Eminent Professors of the Law. Wherefore finding that these Cases do contain many excellent Maxims and Points of Law, which have not hitherto been Printed, or published, do here offer them to the publick view, in a German Translation, hoping that they will be found to be of some use to the like Readers as I am, and I am, &c. J. W.

Wm. Hays



The Names of the Learned Lawyers, Serjeants at Law, and Judges of the severall Courts at Westminster, who argued the Cases, and were Judges of the severall Courts, where the Cases were argued.

viz.

A

Anderson, Lord Chief Justice of the Common Pleas.

Anger.

Alibam, afterwards one of the Barons of the Exchequer.

Atkinson.

Ayliffe, Justice of the Kings Bench.

B.

Beamount, Serjeant at law, afterwards Judge of the Common Pleas.

Bromley, Lord Chancellour of England.

Barkley.

C.

Cook, after Lord Chief Justice of the Common Pleas.

Clench, one of the Judges of the Kings Bench

Cooper, Serjeant at Law.

Clark, Baron of the Exchequer.

D.

Daniel, Serjeant at Law, after Judge of the Common Pleas.

Drew, Serjeant at Law.

Dyer, Lord Chief Justice of the Common Pleas.

E.

Egerton, Sollicitor of the Queen, after Lord Chancellor.

F.

Fleetwood, Serjeant at Law, Recorder of London.

Faller.

Fennor, Serjeant at Law, after Judge of the Kings Bench.

G.

Gawdy, Judge of the Kings Bench.

Golding, Serjeant at Law.

Glanvile, Serjeant at Law, after Judge of the Common Pleas

A

Gent

Gent, Baron of the Exchequer.

Godfrey.

H.

H *Aughton*, Serjeant at Law, after Judge of the Common Pleas.

Hammon, Serjeant at Law.

Harris, Serjeant at Law.

Heale, Serjeant at Law.

Hobart.

K.

K *Ingsmill*, Judge of the Kings Bench.

L.

L *Aiton.*

M.

M *Ead*, Serjeant at Law, after Iudge of the Common Pleas.

Morgan.

Manwood, Lord Chief Baron of the Exchequer.

Mounson, Iustice of the common Pleas.

O.

O *Wen*, Serjeant at Law, after Baron of the Exchequer.

P.

P *Upham*, Attorney General of the Queen, after Lord Chief Iustice of B.R.

Periam, Iudge of the Common Pleas.

Pepper, Attorney of the Court of Wards.

Plowden.

Puckering, the Queens Serjeant at Law.

R.

R *Hodes.*
Iudge of the Common Pleas.

S.

S *Nag*, Serjeant at Law.
Shuit, Iudge of the Kings Bench.

Shuttleworth, Serjeant at Law.

T.

T *Anfield*, Serjeant at law, after Lord Chief Baron of the Exchequer.

Topham.

W.

VV *Ray*, Lord chief Iustice of the Kings Bench.

Windham, Iudge of the Common Pleas.

Walmesley, Serjeant at Law, after Iudge of the Common Pleas.

Y.

Y *elverton*, Serjeant at Law, after Iudge of the Kings Bench.

The

The Names of the Cafes.

Note 1. P. stands for Principall Cafe
2. B stand for a Vouched Cafe.

A.	Sect.		
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<i>Atkinson and Rolfs Cafe</i>	141 p	<i>Beverley and Bawds Cafe</i>	148 p
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<i>Suiron and Danes cafe</i>	467 b

T.

T <i>Asbams cafe</i>	11 p
<i>Tringe and Lewes cafe</i>	20 p
<i>Taylor and Moores cafe</i>	41 p
<i>Troubleseild and Troublefields cafe</i>	46 d
<i>Tacker and Elmers cafe</i>	90 p
<i>Toff and Tompkins cafe</i>	172 p
<i>Tempest and Mallets cafe</i>	246 p
<i>Thetford and Thetfords cafe</i>	274 p
<i>Thetford and Thetfords cafe</i>	283 p
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<i>Trupenies cafe</i>	330 p
<i>Thomas and Wards cafe</i>	331 p
<i>Tedcastell and Halliwells cafe</i>	344 p
<i>Tooly and Prestons cafe</i>	406 p
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U.

U <i>Pton and Wells cafe</i>	202 p
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W.

W <i>Ade and Bemboes cafe</i>	3 p
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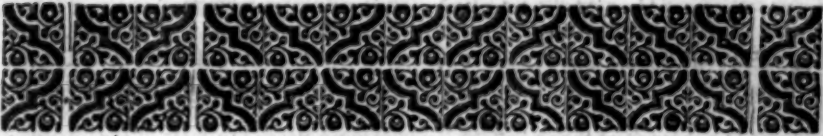
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R E P O R T S



REPORTS and CASES OF LAW.

Argued and adjudged in the time of Queen *Elizabeth*, from the twenty fourth to the three and thirtieth year of her Reign.

Hill. 25. Eliz. in the Kings Bench.

I. *Borneford and Packingtons Case.*

In Trespasse, It was found by special verdict, That the Defendant was seised of the Mannor of B. whereof the place Custom of Free-Bench. where is parcel, demised and demiseable by Cope, &c. And that B the Grandfather of the Plaintiff was seised of the place when, &c. according to the custom of the said Mannor, in fee simple, and that within the said Mannor there is this Custom, That if any Cope-holder dyeth seised, his Wife over-living him shall hold all the Land during her Widowhood as free-bench, and shall be admitted Tenant to the Lord, and that the Heir shall not be admitted to it during the life of his Mother: And found also another Custom within the said Mannor, That if any Cope-holder be convicted of Felony, & the same be presented by the Homage, that then the Lord might seize, &c. And it was further found, that the Grandfather of the Plaintiff took a Wife, and dyed seised, having issue A, Father of the Plaintiff. The Wife is admitted to her free-bench, A is convicted of Felony, and that is presented by the Homage; and afterwards A dyed, after which the Wife dyed, &c. It was argued by Atkinson, that this A is not within the danger of this Custom, for during the life of his Mother, who by the Custom is Tenant to the Lord, and admitted to it, he is Cope-holder, and it is not like to the Case lately adjudged of *possessio fratris*, without admittance, for there the party was admittable, and so he was not here: And also it appeareth by the Custom as it is found, That the Lord upon such matter shall seize, and therefore we ought to make construction that this Custom do not extend to Cases where the Lord cannot seize; but in the Case at Barre, the Lord cannot seize by reason of this free-bench; And we ought not by any construction extend a Custom beyond the words in which it is conceived, but it shall be taken strictly, and not be supplied by Equity with a Custom in the place of a Seizure. But notwithstanding all this, afterwards Judgment was given against the Plaintiff.

II Hill. 25. Eliz. in the Kings Bench.

A Copy-holder doth surrender to the use of one A upon trust, that he shall hold the said Land until he hath leyed certain monies, and that afterwards he shall surrender to the use of B; the moneys are leyed, A is required to make surrender to the use of B, he refuseth, B exhibits a Bill to the Lord of the Mannor against the said A, who upon hearing of the Cause decrees against A, that he shall surrender; he refuseth, now the Lord may seize, and admit B to the Copy-hold, for he in such Cases is Chancellor in his own Court, per totam Curiam.

Hill. 25. Eliz. in the Kings Bench.

III. Wade and Bemboes Case.

In a Writ of Error by Wade against Bembo upon a Judgment given in the Court of the City of Bristol, the Case was, That Bembo was Plaintiff in the said Court against Wade in an Action of Covenant, and declared of a Covenant made by word by the Testator of Wade with Bembo, and declared also, that within the said City there is a Custom, That Conventio ore tenus facta, shall bind the Covenantors as strongly as if it were made by writing: And it was holden by the Court, that that Custom doth not warrant this Action, for the Covenant binds by the Custom the Covenantors, but doth not extend to his Executors, and a Custom shall be taken strictly, and therefore the Judgment was reversed.

25 Pasch. 25. Eliz. in the Kings Bench,

IV. The Lord Paget and Sir Walter Ashtons Case.

The Lord Paget brought an Action of Trespasse against Sir Walter Ashton, who justified because he is seised of three Messuages to him and his Heirs, and that he and all those whose estate he hath, &c. have had the Woodwardship of the Forrest of C, within which, the place where, &c. and also have had within the said Forrest Cstovers without number: And that one Rowland Bishop of Coventry and Leichfield was seised of the Forrest aforesaid in the right of his Church, and by Indenture betwixt him and Sir Edw. Ashton his Ancestor, whose Heir he is, setting forth that divers debates had been betwixt the said parties concerning some profits within the said Forrest; It was agreed betwixt them, that the said Sir Ed. Ashton should release unto the said Rowland all his right in the said Office and Cstovers, and that the said Rowland should grant de novo unto the said Edw. and his Heires the said Office, and one hundred loads of Cstovers per annum out of the said Forrest: After which the said Ed. according to the said agreement, did release to the said Bishop, ut supra, after which the said Bishop by Indenture reciting the said former Covenants in compl. Indenture predict. Convent. did grant to the said Sir Ed. the said Office and Cstovers pro ea sumentis dicti Edwardi, & hered. suorum by assignment of the Officers of the said Forrest; & if the assignment be not made within ten days after request, that then the said Ed. and his Heirs should cut down wood where they pleased, and atterred, the things released were of as great value as the things granted: And upon this matter the Plaintiff did demurre in Law, and it was adjudged for the Plaintiff, for here no Inheritance in the things granted passed to the said Sir Edward, but only an Interest for his own life; for the grant was to Sir Ed. only without the word, Heirs; and the reference to the Indentures, by which the Bishop hath covenanted to grant the Inheritance, nor the words in the grant imply an estate in fee, s. pro easimentis dicti Ed. & hered. suorum, and that in default

default of Assignment it should be lawful for Sir Ed. and his Heirs, shall not supply the defect of the words in the grant.

Mich. 25. and 26. Eliz. in the Kings Bench.

2. Gilbert and Sir George Harts Case.

Gilbert brought Debt upon Escape against Sir George Hart Sheriff of Kent and declared, That he recovered a certain debt against A, who was taken in Execution, &c. And the Case was, That the said A was taken in Execution in the time of the old Sheriff, and escaped also then: and afterwards the Defendant being Sheriff, the Plaintiff again sued a Scire facias against the said A upon the Judgment aforesaid, upon which Execution was awarded by default, and thereupon issued a Capias ad satisfaciendum, by which A was taken, and escaped: And by the opinion of all the Justices, the Defendant in this Case shall be charged, for notwithstanding that A was once in Execution, which was determined by escape in the time of the old Sheriff, yet when Execution was now awarded against him upon his default in the Scire facias, the same shall bind the Sheriff out of whose custody he escaped. Escape.

M. b. 25, and 26. Eliz. in the Common Pleas.

6. Moor and Farrands Case.

Moore leased Lands to Farrand upon condition that he, his Executors or Assignes should not alien without the leave of the lessor; Farrand died intestate, his Wife took Letters of Administration, and aliened without leave, and by Periam Justice, she is not within the penalty of the Condition; for the Administrator is not merely in by the party, but by the Ordinary: And by Meade and Periam, If a Lease for years upon such a Condition be extended upon a Recognisance, the same is not an alienation against the Condition: But some lessee for yeares upon such Condition taketh a Husband and death, the Husband is within the danger of the Condition, for he is Assignee: If the King grant to a Subject bona & catalla felonam, and the lessor for yeares upon such a Condition be outlawed, upon which the Patentee enters, Now by Periam the Patentee is not bound by the Condition, Meade contrary, for the Condition shall go with the Land. Condition where shall not bind Administrator.

Mich. 25, and 26. Eliz. in the Exchequer.

7. Mayneys Case.

Mayney seized of Lands in fee, took a Wife, made a feoffment to a stranger, committeth Treason, and thereof is attainted, and hath a Charter of Pardon and death. It was moved by Plowden in the Exchequer, if the Wife of Mayney shall have Dower against the feoffee. Manwood Chief Baron, by reason of this Attainder Dower cannot accrue to the Wife, for her title begins by the Enter-marriage, and ought to continue and be consummated by the death of the Husband, which cannot be in this Case; for the Attainder of the Husband hath interrupted it, as in the Case of Elopement: And this Attainder is an universal Eschoppel, and doth not run in privacy only betwixt the Wife and him to whom the Escheat belongs, but every stranger may barre her of her Dower by reason thereof; for by the Attainder of the Husband the Wife is disabled to demand Dower as well as to demand his Inheritance; and he cited the Resolution of all the Justices of England in the Case of the Lady Gates, 4. Ma. Dyer, 140. and the Pardon doth not help the matter, for the same extends but to the life Attainder where an Eschoppel.

life of the Offender, but doth not take away the Attainder by which she is barred to demand Dower during the said Attainder in force: See the Statute of 5. E 6. cap. 11. Vid. Fitz. Dower 82. 13. E 3. 8. E 3. Dower 106. Fitz. Ut leg. 49.

8. Mich. 25. and 26. Eliz. in the Exchequer.

In the Exchequer it was found by special verdict, That the Guardians and Chanoons Regular of Stier, were seised of the Mannor of O, &c. and that 22. H. 7. at a Court holden there, granted the Lands in question to W and W his Son for their lives by Cope, according to the Custom of the said Mannor, and that afterwards 30. H. 8. They leased the said Lands by Indenture to H, rendering the ancient and accustomed Rent, and afterwards surrendered their Colledge, &c. and afterwards W and W dyed: And if that Lease so made during the customary estate for life, notwithstanding the Statute of 31. H. be good or not, was the Question, being within a year before the surrender, &c. It was argued by Egerton Solicitor, that the said Lease is void by the Statute; the words of which are (whereof or in the which any estate or interest for term of life, year, or years, at the time of the making of any such Lease, had his being or continuance and was not then determined, finished, or expired) and therefore we are to see, if that right or possession which W had at the time of the making of the Lease, were an interest, or an estate for life: And as to this word (estate) it is nothing else then measure of time, for an estate in fee-simple is as much as to say, an interest in the Lands for ever, and the like of other estates: and therefore here W and W had at the time of the making of this Lease an estate for life in the thing demised: And although such customary Tenants are termed in Law Tenants at will, yet they are not simply so, nor merely Tenants at will, but only Tenants at will, secundum Consuetudinem Manerii, which Custom warrants his possession here for his life, and therefore it is a more certain estate then an estate at will, for the Copeholder may justifie against his Lord, so cannot a Tenant at will, whose estate is determined at the will and pleasure of his Lessor: And although this estate is but by Custom, and by no Conveyance the estate is raised; it is as material, so as if be an estate: and this estate being supported by Custom is known in Law an estate, and so accounted in Law; and the Law hath notably distinguished Copehold, Tenancies by Custom, and Tenancies at will by the Common Law; for a Copeholder shall do Fealty, shall have aid of his Lord in an Action of Trespass, shall have and maintain an Action of Trespass against his Lord, his wife shall be endowed, the Husband shall be Tenant by the Curtesie without new admittance: and it was adjudged in the Common Pleas, 8. Eliz. That if a Copeholder surrender to the use of another for years, the Lessee byeth his Executors shall have the residue of the Term without any admittance: M. 14. and 15. Eliz. a Copeholder made a Lease for yeares by Indenture warranted by the Custom, it was adjudged that the Lessee should maintain Ejectione firm. although it was objected, that if it were so, then if the Plaintiff both recover, he should have Habere facias possessionem; and then Copeholders should be ordered by the Laws of the Land, 10. Eliz. Lord and Copeholder for life, the Lord grants a Rent-charge out of the Mannor, whereof the Copeholder is parcel, the Copeholder surrenders to the use of A who is admitted accordingly, he shall not hold it charged, but if the Copeholder dyeth, so that his estate is determined, and the Lord granteth to a stranger de novo to hold the said Lands by Cope, this new Tenant shall hold the Land charged: and so was it rated and adjudged in the Common Pleas. It was adjourned.

Leases for
three lives of
Cope-hold
estate are not
within Stat.
31. Eliz.

Copy holders
Interest.

Mich. 25. & 26 Eliz. in the Kings Bench.

9. The Lord Paget, and the Bishop of Coventry and Leichfelds
Case.

THE Bishop of Coventry and Leichfeld was indicted of Trespasse in the County of Stafford, of breaking and entring of the Close of Thomas Lord Paget, called the Vineyard, the Bishop traversed the Indictment, and at the day of appearance of the Jury, the Bishop challenged the Array, because that he being a Peer of Parliament, no Knight was returned, &c. Upon which challenge the Queens Counsel did demur in Law, but at last, for expedition, &c. the Court delivered to the Counsell of the Bishop, a Bill sealed to save him the advantage of the said challenge: And the request was taken, de bene esse, who found, that one A by the Commandant of the Bishop entred into the said Close called the Vineyard, being then in the occupation of one B at will, of the said Lord Paget, and did the Trespasse: viz. digged a Turff there, and there left it, and so departed. The matter of challenge was many times argued, and it was argued against the said challenge, because that the King is party, against whom no Lord of Parliament shall have such Prerogative, to which it was answered on the other side, that so much the rather, the challenge lyeth in the Case, for where a Peer of the Parliament is to be tryed upon an Indictment of Treason or Felony, it shall be per pares, if upon appeal of Murder, or Felony by ordinary tryall, see 33. H. 8. Br. Trepass 41. and Br. Enquest, 49. It was said on the other side, that here the Bishop is quodam modo, and the Venire facias issued at his own suite, and therefore the mismaking of the Pannell is his own fault; But by Gawdy Justice, the Venire facias in this Case is reputed in Law, the suite of the Queen, notwithstanding that the party indicted for his expedition, doth pay the fees for the Procelle, for that, the Clerks of the Court have encroached for their gaine, for otherwise there should be none paid by the Queen, and by the better opinion of the Court, the challenge was holden good: Another matter was moved, because the Indictment is (clausum Domini Paget) and it appeareth by the Clerdict, that the said close at the time of the Trespasse was in the occupation of B, at the will of the Lord Paget: for the Lord Paget cannot have an Action of Trespasse against the said Bishop, or the said A upon the matter, & by Wray, the Lord Paget cannot have Trespass, Quare clausum fregit & intravit upon this matter; but for digging upon the Land, demised, or cutting of Trees, an Action lyeth, 19. H. 6. to Trespass, 36. But here the Indictment is, that one F entred by the commandment of the Bishop, upon which matter no Action lyeth against the Bishop, by the Lord Paget, and especially in this case where the said A did not carry away the said Turff from thence, but by Wray, notwithstanding that the Action of Trespass doth not lye for the Lessor, yet it is well enough by way of Indictment: Another exception was taken to the Indictment, because it is alleadged, that A by commandment of the Bishop entred, and did the Trespasse, and no place is shewed where the commandment was, and for this cause, the Bishop was discharged.

Mich. twenty five, and twenty six Eliz. in the Kings Bench.

10. Stoneley, and Bracebridges Case.

IN Ejectione firmæ, by Stoneley against Bracebridge, the case was, Thomas Bracebridge father of the Defendant was seised of the Mannor of Kingsbury, to him and to the heires males of his body, and 31. H. 8. Leased a feild called Stalling, parcell of the said Mannor, to Tho. Coke for years, and afterwards, 4. E. 6. Leased the said feild (the first Lease being in esse) to Sir Geo. Griffith for

seventy years, who assigned the same to A Bracebridge Brother of the Lessor, and to Joyce Wife of the Lessor, and afterwards, 5. E. 6. The said Tho. Bracebridge, the Lessor, by his Deed Indented, gave the said Mannor to the said Sir George by these words (*dedi concessi, bargainavi, & vendidi*) *Proviso*, and upon condition, That the said Sir George, should pay to the said Thomas Bracebridge, within fifteen dayes after, ten hundred pounds, and if he faile of payment thereof, that then after the said fifteen dayes, the said Sir George should be seised of a Tenement, parcell of the said Mannor of the yearly value of three pounds (now of late in the occupation of Thomas Smith) to the use of the said Thomas Bracebridge for his life, and after to the said Sir George, untill he had leyed five hundred pounds for the payment of the debts, and the education of the children of the said Thomas Bracebridge, and after to the use of the Defendant in tail: And of the residue of the said Mannor, to the use of the said Tho. Bracebridge, and of the said Joyce his Wife for their lives, &c. Tho. Bracebridge, made livery to the said Sir George, in one place parcell of the said Mannor, which was in his own occupation in the name of the whole Mannor: the fifteen dayes incur without payment of the said ten hundred pounds, the Indenture is enrolled: Coke attornes, Joyce dyes, Tho. Bracebridge grants the Lands to a stranger by Office, and befoze Proclamations, Thomas his Son and Heire apparent, within age, enters, in the name of the Feoffers by reason of the forfeiture, Proclamations are made, Tho. Bracebridge the Father dyeth, the Terme of Coke expireth, A enters, and leaseth to the Plaintiff who enters, upon whom Tho. Bracebridge the Son enters, upon which Entry the Action is brought, it was foggered by Beaumont the elder: Although here in the Indenture of bargain & sale, there is not an expresse consideration set down in the common forme of a consideration, yet because the consideration is implied in the condition it is good enough (see the *Proviso* and condition, *ut supra*, that the said Sir George should pay, &c.) As if I bargain and sell to you my Land, *Proviso* that you pay to me for the same at such a day one hundred pounds, that consideration set downe in the forme of a condition is as effectual, as if it had been formally expessed in the usuall Termes, as to the second payment: Where a man bargaines and sells his Lands by Deed indented to be enrolled, and befoze enrollment he makes Livery to the Bargainee, and afterwards the Indenture is enrolled, the Court discharged Beaumont from the arguing of that payment, for by Wray, the Livery doth prevent the operation of the Enrolment, and Sir George shall be accounted in by the Livery, and not by the bargain and sale, for Livery is the more worth, and more worthy ceremony to passe estates, and therefore shall be preferred: and then the Livery being made in such part of the Mannor, which was in the possession of the Feoffor in the name of the whole Mannor, no more of the Mannor passeth but that which was then in the possession of the Feoffor: And the Reversion of such part of the Mannor which was in Lease shall not passe without Attornment, but when the Enrolment cometh, now the whole passeth, and then the Reversion being settled by the Enrolment, the Attornment coming afterwards hath no relation: See 48. E. 3. 15. 16. The Jury here have found the default of payment, thereby the conditionall use which passed by the bargain and sale, upon the condition broken, shall be returned to the Bargainor without any Entry, & then the uses limited after are void, for in use limited upon an use cannot rise; *quod fuit concessum per totam curiam*, then Bracebridge the Father, having the Inheritance of the said Mannor in his own right, and the interest *de futuro*, for yeares in the right of his Wife jointly with the said A, when he sells the said Mannor by Deed indented and enrolled, now thereby the interest for yeares which he hath in the right of his Wife doth not passe, for a bargain and sale is not so strong a conveyance as a Livery. As if I have a Rent-charge in the right of my Wife, out of the Mannor of D, which Mannor afterwards I purchase, and afterwards by Deed indented and enrolled, I bargain and sell the said Mannor, &c. the Rent shall not passe.

Livery, where
it prevents o-
peration of
an Enrol-
ment.

passe. When the said Thomas Bracebridge the Father having the said Right of
 an entaile to him and the Heires Males of his body, and being Tenant for life,
 by his own conveyance, the Remainder in tail to his Son and Heire apparant,
 the now Defendant, when he leaveth a Fine, and the Son enters for forfeiture
 before Proclamations passe, and his Father dyeth, in that case the Defendant is
 not remitted unto the first entail, although after Proclamations passe in the life
 of the Father, and so he shall not avoid the Leases; for notwithstanding that the
 Issue in taile by that Entry hath defeated the possession which passed by the
 Fine, yet as to the right of the old entail, the Fine doth retain its force, and so
 he entred, quodam modo, in assurance of the Fine: As if Tenant in tail
 doth discontinue and disseiseth the Discontinuee, and leaveth a Fine with Pro-
 clamations, and the Discontinuee enters within the five yeares, now although
 the Fine as to the Discontinuee be avoided, so as the possession which passed
 by the Fine is defeated, yet the right of the entail doth continue bound: Eger-
 ton Solicitor contrary: and he conceived, that all the Mannors doth passe by the
 Libery to Sir George, and nothing of it by the Enrolment, and that the mean-
 ing of the parties was, that all should passe by the Libery, for if the assurance
 should enure by the bargain & sale, then the secondary uses limited upon default
 of payment, should never rise; for an use upon an use cannot rise, & then the said
 uses limited for the payment of the debts of the Scroffs, &c. should be defeated, &
 also where at the beginning of the assurance, the condition was entire, the warrant-
 ty entire, &c. & if such construction should be allowed, here shall be a divided con-
 dition, a divided warranty: And also the meaning of the parties that the whole
 Mannors should passe, by such construction should be dismembred, and part passe
 by the Libery, and part by the bargain and sale, and we ought to make such
 constructions of Deeds, that things may passe by them according to the mean-
 ings of the parties; as if I be seised of a Mannor to which an Abbotsen is ap-
 pendent, and I make a Deed of feoffment of the same Mannor, cum pertinen-
 cijs, and deliver the Deed to the party, but no Libery of seisin is had, the Ab-
 botsen shall not passe, for then it should be in grosse, whereas the meaning of
 the parties was, that it should passe as appendant, and that in such case cannot be,
 for there is no Libery, therefore it shall not passe at all, and so it hath been ad-
 judged: So if I bargain and sell my Mannor of D, and all the Trees in the
 same, and I deliver the Deed, but it is not enrolled, the Trees shall not
 passe, for the intent of the parties was, that the Trees should passe, as par-
 cell of the Freehold and not as Chattels. And as to the remitter, I con-
 ceive, that the Heire entering as Heire, by the Law is remitted, but where
 the Entry is given by a speciall Statute, there the Entry shall not enure fur-
 ther then the words of the Statute; As Land is given to the Husband and Wife,
 and to the Heires of the body of the Husband, the Husband leaveth a Fine and
 dyeth, the wife entred, this Entry shall not avail to the issue in tail, for the
 Entry is given to the Wife by a speciall Law: And he cited Sir Richard Had-
 dons Case, the Husband aliened the Lands of his Wife, they are divorced, the
 Husband dyeth, the Wife shall not enter by 31. H. 8. but is put to her writ
 of Cui invita ante divor. And afterwards the same Terme the Justices ha-
 ving considered of the Case, delivered their opinions upon the matters by Wray
 cheif Justice, viz. That the one moiety of the Lease was exting by the Libery,
 viz. the moiety of loyce the Wife of the Lessor; and as to the other moiety it is
 in being, for here is no remitter; for if any remitter had been in the Case, it
 should be after the use raised, which is not as yet raised, for the Land ought to
 remaine in Sir George untill the said five hundred pounds be leyed, and that
 is not found by the Verdict, and therefore for the said moiety, the Plaintiff had
 Judgement.

Mich. 25, and 26. Eliz. in the Exchequer.

X I. Treshams Case.

SIR John Tresham seised of the Mannor of D holden of the King in Capite by Knights service, 4. H 7. enfeoffed Edmund Earl of Wilts and N Vaux Knight, who gave the said Mannor to the said Sir John in taylor, upon condition that he should not alien, &c. quo minus, &c. John Tresham dyed seised, by whose decease the Mannor descended to Tho Tresham, who entred, and 18. H 8. aliened with licence, by recovery, &c. N. Vaux the surviving feoffee dyed, having issue W Lord Vaux; the purchaser dyed seised, his Son and Heir 14. Eliz. leyed a Fine Sur Conusans de droit, &c. and that Fine was leyed to the use of the Conusee, &c. and that without licence: The Lord Vaux within five yeares after the Fine leyed, entred for the condition broken: and now issued forth a Scire facias against the Conusee for that alienation without licence, who made default, whereupon issued proccesse to seize the Lands; whereupon came Sir Tho. Tresham, and shewed the whole matter aforesaid, and prayed to be discharged. It was said, that this Prerogative to have a Fine for alienation without licence, had lately beginning upon the original Creation of Seignories, so as this prerogative is as it were paramount the Seignory, and shall go paramount the Condition, as well as the Condition is paramount the Alienation, but if the disseisor of the Tenant of the King maketh a feoffment in Fee, now upon the entry of the disseisor, the person of the feoffee shall be charged with a Fine, but the Land by the re-entry of the disseisor is discharged: and such is the opinion of the Lord Frowick, in his Reading upon the Statute of Prerogativa Regis, and the reason is, because the disseisor is not Tenant to the King, and so when he aliens, it cannot be said an Alienation by the Kings Tenant. See 45. E. 3. 6. If the Tenant of the King in chief leaseth for life with licence, and afterwards grants the Reversion over without licence, the Tenant for life is not bound to attorn in a Quid juris clamat; wherefore it seems, that if such Tenant doth attorne, the King shall seize presently. This Entry for the Condition broken is not to have so violent a retrospect to the first liberty to which the Condition was annexed, that it shall defeat all things meane between the Creation and the breach of the Condition, but it shall defeat all mean things which rise upon the act of the party, as Rent, Dower, &c. But charges which accrue by reason of Tenure, do remain, notwithstanding the Entry for the Condition broken: As if such a Tenant of the King maketh a feoffment in Fee upon condition which is broken, the feoffee dieth seised, his Heir of full age, the feoffor re-entreteth this re-entry by force of the condition broken, hath not so avoided the descent, but the King shall have Relief upon the said descent, for the Relief is paramount the Liberty, and the condition. So if a feoffee upon condition disclaim in Abowry, by which the Lord brings a Writ of Right Sur Disclaimer, and hath Judgment; the feoffee entreteth for the condition broken, the said re-entry shall not avoid the interest of the Lord by the Judgment on the Writ of Disclaimer, but he may enter at his pleasure; and it was moved by Plowden who argued for Tresham, that if the Tenant of the King, being Non Compos mentis, makes a feoffment in Fee, and dyeth, his Heir entering upon the feoffee shall not pay a Fine for the Alienation of his father, but the person of the father shall be charged with it. And at the end of this Term, after many Arguments and Motions, Judgment was given for the Queen, that she should seize the Land and hold the same for the Fine, and that she should not be driven to sue the person of the feoffee or Conusee: And by Manwood chief Baron, at the Common Law in many Mannors, Tenant in soccage upon every alienation shall pay a Fine, nomine relevii a fortiori, in the Kings case, and therefore he was of opinion, That

Fine for Alienation without Licence.

Entry for Condition, what acts it shall defeat.

Condition shall not avoid an Interest vested.

that this Privilege to have a Fine for alienation without licence is by the common Law, and not by any Statute.

Mich. 25, and 26. Eliz. in the Exchequer Chamber.

XII. Cater's Case.

A Bill of Intrusion was in the Exchequer against Cater; who pleaded the Grant of the Queen, the Plaintiff replicando said, that before the Queen had any thing, &c. Sir Francis Englefield was seized of the Manor, of which, &c. and he being beyond the Seas, the Queen sent her Letters under the Privy Seal, Quod ipse in fide, & legeantia quâ dicta Regina tenebatur, indirecte rediret in Angliam, predicta tamen Franciscus (spretis mandatis dict. Regina) venire recusavit, for which a Certificate was by the said Queen into the Chancery, Quod dictus Franciscus in portibus transmarinis sine licentia dict. Regina remansit: And thereupon a condition was awarded to seize the Lands of the said Sir Francis, which was entered in the Replication in hæc verba, reciting also the Queens Privy Seal, and that the said Sir Francis did stay there (spretis mandatis, &c.) for which the Queen seized and granted to the Plaintiff: And afterwards the Statutes of 13. and 14. Eliz. were made: after which the said grant was made to the Defendant, upon which matter there was a Demurrer and Judgment given for the Plaintiff. And now Cater brought a Writ of Error in the Exchequer Chamber, and it was first assigned for Error, because that the Record is entered Inter Johannem Cater present. hic in Curia by I S Attornatum suum, and that cannot be, for it is oppositum in objecto. that one can be present in Court and also by Attorney, simul & semel, for the Attorney is to supply the default of the personal presence. To which it was said by Wray, Anderson and Periam, that the matter assigned was no Error, for there are many Presidents in the Exchequer of such Entries, which were openly shewed in Court. 48 E 3. 10. R 2. 20 H 7. 20 H 8. And by Manwood their Baron it is not so absurd an Entry as it hath been objected, for if one hath an Attorney of Record in the Kings Bench, and he himself is in the Marshalsea, there in an Action against him, he is present as Prisoner, and also by Attorney; and by them, notwithstanding that here appeareth a contrariety, for such entire property (presentem hic in Curia in propria persona sua) yet because many proceedings are according, it is the more safe course to follow them, for if this Judgment be reversed for this cause, many Records should be also reversed which should be very perillous: Another Error was assigned, because it is not alleged in the Replication, of what date the Privy Seal was, nor that any notice of the said Privy Seal was given to Sir Francis, to which it was said, that the Privy Seal need not any date especially in this case, for the matters which are under the Privy Seal are not issuable. See 2 Eliz. Dyer. 177. nor any traverse can be taken to it, and this Privy Seal is not as other Writs and Præcipes are, returnable in any Court, but the Queen her self from whom originally it came shall receive it, and also the Writ upon it, and she her self in such case is Judge of the contempt, and no Record of that Privy Seal doth remain in any Court, but the Queen her self shall keep it, and then when the Queen is informed of the contempt, she makes a Warrant sometimes to the Chancellor to award a Commission, sometimes to the Treasurer and Barons of the Exchequer to the same purpose to seize the Lands, and that Warrant is signed, with the Seal manual of the Queen, and the Queen may certify, and set down the cause of such seizure in such Warrant, and no other Certificate is made by the Queen, and the Queen may certify the same Commission by word of mouth, and if the other party will say, that the Queen hath not certified it, he shall be concluded by the commission which is under the great Seal, and others Presidents

Fugitives.

dents were shewed openly in Court to that effect. And all the matter aforesaid, was agreed by the Chancellor, Treasurer, and the said Justices, and no certificate at all needs to be in the Case, and then a superfluous Certificate being nought, shall not part: for Pagation is surplussage. Another matter was to consider, what interest the Queen hath in the Lands of Fugitives by the common Law; And as to that they were all clear of opinion, that the Queen in such case as aforesaid may seise, and assigne her interest over: And that such Assignees may grant Copeholds, parcell of the Mannor assigned, which grants shall bind him who cometh in after, cum manus Domini regis amoveatur, and also when the Statutes of 13. and 14. of Eliz. come, the Statutes doe not amend the estate of the Queen, but the estate of the Queen doth continue as before, and all the Estates under it. And there was shewed unto the Court diverse Presidents of seisures in such Cases, 18. E. 2. Edmond de Woodstock, Earle of Kent went beyond Sea without License of the King, and he went with Robert de Mortimer, and the King did certifie the same into the Chancery, reciting that he had sent his Privy Seal, &c. but that the said Edmond (spreitis mandatis nostris redire recusavit) upon which issued a commission to seise, &c. And it was holden that the Queen having seised by by force of the common Law, and making a grant of a Copehold out of it, now when the Statutes of 13. & 14. Eliz. are made, shee hath not any estate thereby, for shee had such interest before, and this new seisure after the Statutes works nothing, and nothing accrues to her thereby, whereof shee can make a seisure: For shee hath departed with the whole before, See 23. Eliz. Dyer, 376. And note, that the grant of the Queen in the case at Bar was, quamdiu in manibus nostris fore contigerit. And afterwards Judgement was given, that judicium predictum in omnibus affirmetur.

Ter. Mich: 25. and 26. Eliz. in the Common Pleas.

XIII. Sutton, and Dowse Case.

Tithes.

Sutton, Vicar of Longstoke, Libelled against Dowse in the spirituall Court, and shewed in his Libel, that upon the Erreccion and Endowment of his Vicaridge, four quarters of Coine were assigned to the Vicar out of the Granary of the Priory of B. of the Tithes of the Parsonage of Longstoke, and that the Parson or Fermor of the said Rectory of Longstoke, had alwayes paid the said four Quarters of Coine to the said Vicar and all his Predecessors, and alleadged further, that the Lord Sands was seised of the said Rectory, and leased the Barne and Tithes Coine parcell of the said Rectory, to the said Dowse, his Wife, and Son, Habendum to Dowse for Terms of his life, the Remainder to the Wife for Term of her life, the Remainder to the Son for life: And shewed further, that the said Dowse had covenanted with the said Lord Sands, to render the said four Quarters of Wheate to the Vicar and his Successors, upon which Dowse procured a prohibition, and Sutton prayed a consultation, and it was moved in Ray of the consultation that the Vicar had Libelled upon a Covenant which Dowse is taxed to pay the said Coine, and that is a lay Title, and determinable by the Law of the Land, and not in the Ecclesiasticall Court: But as to that the opinion of the Court was, that the Libel is not grounded upon the covenant, as the sole Title to the said Coine against Dowse, but upon the Endowment of the Vicaridge, and the Lease by which Dowse is become fermor of the Rectory: Another matter was moved, because that upon the Libel it appeareth, that the Lease aforesaid made by the Lord Sands was made to Dowse his Wife, and his Son, jointly, in the Premises, Habendum ut supra, in which case it was objected, that Dowse his Wife, and his Son, are all three fermors of the said Barne and Tithes jointly in possession, against all whom Sutton

ton ought to have Libelled, &c. and not against Dowse only, for the Habendum hath not severed their estates which were joyned before, quod tota curia negavit, for the Habendum hath severed the joyned estates limited by the Premises, and hath distinguished it into Remainders, but if the Habendum had been, Habendum successive, the estate had remained joyned: Another matter was moved, because it appeareth upon the Libel, that the Parson, or Fermor of the said Rectory ought to pay to the Vicar the said Cozne, and also it appeareth upon the plat that Dowse is not Parson, nor Fermor of the said Rectory, for the Lord Sands had leased to Dowse and his Son, but the Barne and the Lithe Cozne parcel of the said Rectory, so as Dowse is Fermor but of parcel of the Rectory, & the residue of the Rectory both remaine in the Lord Sands, in which case the said Sur. ought to have Libelled against the Lord Sands, and Dowse, and not against Dowse only; And for that cause the consultation was denied. And in this case it was further agreed by the Court, that if upon a Libel in the spirituall Court, the Defendant makes a surmise in Banco to have a Prohibition, if such surmise be insufficient, the other party needeth not to demur upon it, and to have it entered upon Record, but as amicus Curie, he shall shew the same to the Court, and the Court shall discharge him.

Mich. 25. and 26. Eliz. In the Kings Bench.

XIV. Punsany, and Leaders Case.

OSmond Punsany brought an Action upon the case against Leader, and declared, that one Bedingsfeild was seised of the Mannor of D, and that he and all those whose estate he hath in the said Mannor, time out of mind have had, libertatem Faldagij, & cursum omnium, in the Town of D, & pro meliori pasturatione omnium suorum, the Inhabitants of the said Towne having any Lands within the said Towne, every second yeare left their Lands to lye fresh and unfilled, and prescribed further, that the Tenants of the Lands within the said Towne might erect Herbals in their lands, with the License of the Lord of the said Mannor, and not otherwise: and further declared, that the said Bedingsfeild had let to him the said Mannor, and that the Defendant had erected Herbals upon his Lands without License, so as the profit of his Foldage is impaired by it: And all this matter was found by Verdict: And it was objected in stay of Judgement, that the prescription is not good, for it is against Law and common right to abridge the Subject of the profits of his Lands: But the whole Court was clear of opinion, that the prescription is good enough, as 15. E. 2. Prescription 51. Prescription to have common appendant in other Land after that the Hay is cut, and 7. E. 1. Prescription, 55. A seised of Lands may Plow it and Sow it, and cut and carry away the Cozne, and afterwards when the Cozne is carryed, B by prescription may have the said Land as his sefeial, and the other who sowed it cannot medle with that land, but to plough and sow it in season, &c. And the Cattel cannot eat and pasture in the Land when they come to plow or sow it, or to carry it away, nor have any profit but the Cozne, and yet the freehold of the Land is in such person, &c. and that was holden a good Prescription, and a difference was taken by the Court, where one doth prescribe to take away the whole interest of the Owner of the Land, and where a particular profit is retained: And here this prescription doth not extend but to restraine the Tenant to erect Herbals, which is a reasonable prescription, See 1. H. 7. 24. The Lord of the Towne doth prescribe to have free Foldage of the Beasts of his Tenants in D, and see there, that libera Falda is not any other, but to have the Beasts of the Tenants to manure the lands of the Lord, &c. And afterwards Punsany the Plaintiff had Judgement to recover.

Prescription
of Foldage.

XVI. Mich. twenty five, and twenty six Eliz. at Serjeants Inn.

The King not
bound to de-
mand Rent.

In the Dutchy Chamber, the case was, that King E. 8. leased for yeares cer-
taine lands parcel of his Dutchy of Lancaster, rendering rent with clause of
re-entry, and that lease was made to one Dugny; It was found by Office that
the Rent was arrear, and by another Office, that the Barbant of the said Lessee,
had entered the Rent in the absence, and by the commandment of his Master
and that afterwards one JS. Receitor Generall of the Dutchy, received the said
Rent, and had accounted for it, and upon his account it was allowed; And this
matter was opened at Serjeants Inn in Fleet-street, before Wray, Anderson,
Manwood, Clench, Rhodes, Plowden, and Stanhop, and it was argued by
Shutleworth, that in this case of rent reserved upon Lease for yeares, made by the
King of Dutchy Land, the King is not bound to demand it, but he may for de-
fault of payment of it, re-enter without demand, & that the Lessee is tied to tender
it at his peril, as well as if the Queen had been leased of the said land in the right
of her Crown, and as to that payment, the Statute of 1. H. 4. is to be consider-
ed, by which it is enacted, that the possessions of the said Dutchy Talicer, & tali-
modo, & per tales officarios & ministros in omnibus remaneant, deducantur, & gu-
bernentur sicut remanere, deduci, & gubernari debuissent, si ad culmen Regis Di-
gnitatis assumpti non fuisset, and these words ought to be intended of things
which concerne the Lands themselves, but this Act of demand is a personall
thing, and concernes the person of the King, and toucheth the Majesty, and dig-
nity of the King, and in all cases of the Dutchy the person of the King shall hold
his privilege, notwithstanding that the possession of the Land be carried in the
course of a private person: And therefore if the Queen will alien Lands par-
cell of her Dutchy, shee ought to make Liberty, for now shee medles with the
possession it selfe: but if the Queen will sue for parcell of her Dutchy, non omi-
tas shall be in the writ, for shee cannot sue but as Queen, and the Queen hath
such prerogative, that none shall execute her writs at her own sute, but the Of-
ficer of the Crowne, 21. E. 4. 60. for Liberty if it be not Land within the Coun-
ty Palatine, and for the residue, See 10. H. 4. 7. 3. Eliz. 216, 217. Plowden,
Lessee for yeares of Lands of the Dutchy, shall have aid of the King before Jure
joyned, &c. And if the King make a feoffment of Lands of his Dutchy out of
the County Palatine, to hold of him in Capite, the feoffee shall hold it so, and
a feoffment of such Lands upon condition that the feoffee shall not alien is a
good condition, and Lapses shall not binde the Queen in case of an Ad-
vowson which the Queen hath in the right of the Dutchy, and if the villain of
the Queen in the right of the Dutchy purchaseth Lands in Fee, and aliens, yet
the Queen shall seise, and that hath been adjudged in the Grebequer Chamber,
and if the Queen make a Lease of such Land, and afterwards makes another
Lease of the same Land without recitall of the first Lease, it hath been adjudged
that the second Lease is void. It was argued contrary by Beamount the youn-
ger, that this condition which goeth to the realty, to reduce the Land againe,
ought to be ordered and governed by the Queen, as it ought to be by a Subject;
and therefore, if the Queen will take advantage of this condition, shee ought to
make a Letter of Attorney under the Dutchy Seal, to her own Officer, autho-
rizing him thereby to make demand of the said Rent, &c. And by Shutleworth
here be two Offices, the one contrary to the other, the best shall be taken for the
Queen, 14. E. 4. 5. in Skreems Case in the end of it: And if the Rent of the
Kings farmes be behind, notwithstanding that after the Receitor of the Dutchy
both receive it, yet the same doth not purge the forfeiture, as if the Bayliffs of a
Manor receive rent of a new feoffee, the same will not change the Advowson
of the Lord without notice given to him, 41. E. 3. 26. And if a Copp-hold
escheat,

escheat, the Steward without a special Warrant cannot grant it over De novo.

Mich. 25, and 26, Eliz. in the Kings Bench.

XVI. Rearsbie and Rearsbies Case Intrat. Trinit. 25 Eliz. rot. 746.

Replevin by W Rearsbie and A Rearsbie, against L Rearsbie, who avoyn the Distresse, because that one W Vavasour was seised of the Mannor of Deniby, whereof the place where, &c. is parcel in his Demesne as of Fee, and so seised gave the said Mannor to one L Rearsbie Father of the Plaintiff, and of the Abovants and Jane his Wife, and to the Heirs of Lyonel, who by his Will devised unto A Rearsbie a Rent of four pounds out of the said Mannor, with clause of Distresse, for his childs part, to be yearly paid, Lyonell the Father dyed 3. Eliz. and after wards, 21. Eliz. Jane dyed, and for the arrearages of the said Rent incurred mean between the death of Lyonel and Jane his Wife, &c. upon which Abovny the Plaintiff do demurre in Law, for the Rent doth not begin in effect, but after the death of the Wife of the Debitor, for such construction ought to be made of the Devise, as not to charge the Inheritance with the whole arrearages, &c. and it was argued to the contrary, that the Defendant might well avoyn the Distresse for these arrearages; for if he in the Reversion upon a Lease for life grant a Rent charge after the death of the Grantor, the Grantee shall Distrein for all the arrearages incurred after the grant, etiam, during the life of the Grantor, quod Curia concessit: and it was said by the Council of the Abovant, that the Case at Bar is a stronger Case, for this Rent, as it appeareth by the words of the Devise, was devised to the Abovant for his livelihoood, and for his childs part, which words imply a present advancement, and these words yearly to be paid is strong and pregnant to that intent. It was adjourned;

Construction
of Devise.

Distresse.

XVII. Hill. 25. Eliz. in the Kings Bench.

The Earl of Northumberland brought debt upon arrearages of Action, the Defendant shewed that before the Account, the Plaintiff of his own wrong did imprison the Defendant, and assigned Auditors to him being in prison, and so the Account was made by duress of imprisonment: And the same was holden a good Plea by all the Justices of both the Benches. And Judgment was given accordingly.

Pasch. 26. Eliz.

XVIII. Pasch. 26. Eliz. in the Kings Bench.

Forman and Bohans Case.

Replevin by Forman against Bohan, the Defendant avoyned for a Rent charge, and shewed, that one Wingfield was seised of the Mannor of Welsham, whereof the place where, was parcel: And 33. H. 6. made a feoffment in Fee of the place where, &c. to one Orlow, rendering Rent and suit at the Court of the said Mannor, and that the said Wingfield was seised of the said Rent and Sute accordingly, and dyed thereof seised, and that the same descended to Anthony Wingfield as Son and Heir, &c. who was seised of the said Rent as parcel of the said Mannor, and that the said Anthony, so seised of the said Mannor and Rent, bargained and sold the said Mannor & Rent, 26. H. 8. to Nicholas Bohan Father of the Abovant, by these words; Manerium de Welsham, et omnes omnimodas redditus, reputed, deemed, or adjudged part or parcel of the said Mannor, who entered, and did seise, and the same descended to the now Abovant, as Son and Heir;

Replevin.

Deir, &c. and a berved, that the said Kent at the time of the bargain and sale aforesaid, et diu ante, was reputed parcel of the Mannor aforesaid: Upon which A. bolver, the Plaintiff did demurre in Law, and it was argued by Gawdy Serjeant for the Plaintiff, and he took an Exception to the Abovery, because the Aboverment sheweth, that Anthony Wingfield 26. H. 8. bargained and sold the said Mannor to Bohan Virrute Quar. bargain et vendicionis, et vigor. cujusdem Actus Parliamenti 27. H. 8. de usibus, &c. the said Bohan was seised, &c. where he ought to have said; by force of which bargain and sale the said Anthony Wingfield was seised of the said Mannor aforesaid, to the use of the said Bohan, and that afterwards by reason of the said Statute of 27. H. 8. the said Anthony then seised to the use aforesaid, the said Bohan was seised in his Demesne as of Fee: For it might be for any thing appearing in the Abovery, that before the said Statute of 27. H. 8. Anthony Wingfield had made a conveyance upon consideration to him who had not notice of the use, so as the use being suspended, when the Statute came, it could not be executed, for there was not any seisin to the use, and to that purpose he cites the Case of 7. H. 7. 3. where a gift of Trees by Cestuy que use is pleaded, without alleging that the Feoffors were seised to the use of the Donor at the time of the gift: To that Exception it was answered by Popham Attorney General, That there is a difference betwixt the Case at Barre, and the Case of 7. H. 7. for where a man entitles himself by Cestuy que use, he ought to maintain such title by every necessary Circumstance, which the Law without expressing will not intend, but where a man alledgeth a matter, which is but a conveyance, there needs no especial recital; as if a man will pretend the grant of a Reversion, & that the lessee for years did assign, he needs not to shew, that at the time of the Assignment the Grantor was seised, &c. and he cited the Case of 10. E. 4. 18. In Trespasse, the Plaintiff by way of Replication made to him a title, that A. was seised and leased to him at Will; by force of which the Plaintiff was possessed, until the Defendant did the Trespasse, and Exception was taken to it, that the Plaintiff in his Replication had not averred, that A. was alive at the time of Trespasse, and it was not allowed, for the subsequent words (by force of which the Plaintiff was possessed until the Defendant did the Trespasse) do amount unto so much, for the Plaintiff could not be possessed by force of the said Lease at Will, if A. were not alive. So here, Bohan could not be here seised by force of the said Statute, if the seisin of the use which was raised by the bargain and sale had not continued until the coming of the said Statute: As to the matter in Law, Gawdy conceived that the averment in the purchase of the Abovery is contrary to the matter of the Abovery, for the creation of the Kent set forth in the Abovery proves, that the Kent is not parcel of the Mannor, but a Kent in grosse, and then the general averment, that the Kent is parcel of the Mannor, without shewing how, against the special matter of the Abovery, is not receivable. And also nothing can be by reputation parcel of a Mannor, which in rei veritate cannot be parcel of a Mannor, but a Kent charge cannot be in rei veritate parcel of a Mannor, ergo, nor by reputation: Popham contrary; That the averment is not contrary to the matter of the Abovery, for the matter disclosed in the Abovery proves, that it is not rei veritate parcel of the Mannor, but it doth not exclude Reputation, and the Averment doth not extend ad veritatem facti, which is set forth in the Abovery, but only to reputation, and so both stand together well enough: And that a Kent charge may be parcel of a Mannor, see 22. E. 3. 13. 31. E. 3. 23. in the Lord Tiptoft's Case, where it is ruled, that title made to a Kent charge as parcel of a Mannor is a good title, and the Assize awarded upon it, and in our Case the Reputation is enforced by the sute at the Court, which was also referred upon the said Feoffment, together with the said Kent, so as the intent of the parties to the Feoffment was, that this Kent so referred and accompanied with the said sute shall be esteemed a Kent service, and so parcel of the Mannor, and as to the continuance of Reputation it sufficeth, if at the time of

Averment.

Reputation.

Rent charge
parcel of a
Mannor.

the bargain and sale aforesaid, which was 26. H. 8. it was by many reputed parcel of the Mannor, and he cited the Case of the Parquesse of Winchester: The King gave to his Ancestor the Mannor of Dale and all lands then antea reputed parcel of the said Mannor, and in a Bill of Intrusion against the said Parquesse he pleaded the grant with averment, that the Land then antea reputed parcel Manerii predict. And because he did not shew certainly at what time the Land was reputed parcel of the Mannor, Judgment was given for the Queen, for it might be for any thing in his Plea, that the said Land was reputed parcel of the said Mannor before time of memory, which Reputation would not serve: but such Reputation ought to be within time of memory and understanding: He cited also the Case of the Earl of Leicester. King Edward the sixth seized of the Mannor of Clibery, of which a Wood was parcel, granted the said Wood in fee, which afterwards escheated to the King for Treason; Queen Mary granted the said Wood to another in fee, who granted it to the now Queen, who granted the said Mannor & omnes boscos modo vel ante hac cogniti vel reputati ut pars, membr. vel parcel. Manerii predict. to the Earl of Leicester, and it was resolved in the Exchequer, that by that grant the said Wood did passe to the Earl, and Judgment was given against the Queen, for it was part of the Mannor in the time of E. 6. at which time (ant' hac) without the word (unquam) shall be extended ad quodamcunque tempus preteritum. And Reputation needs not so ancient a Pedigree for to establish it; for generall acceptance will produce reputation: As the house of the Lord Treasurer now called Tibould was now of late a private Mannor, but now hath a new name by which it is known, and that within these twenty years, which is not so long a time as we have alledged for our Reputation, and would passe in a conveyance by such name, so None such. But as to Reputation, I conceive that Reputation is not what this or what that man thinketh, but that which many men have said or thought, who have more reason to know it; & quoniam est inter illos reputatio: *Reputationis* *quid.* There was a Case ruled in the Exchequer 13. Eliz. in a Bill of intrusion; the Case was, that King Hen. 6. was seized of a Mannor, to which a Peise was regardant, who purchased Lands which the King seized, and let by Copy as parcel of the said Mannor, and so continued until the time of E. 6. who granted the same to Alice Hardwick, and all Lands, Tenements, reputed parcel of the said Mannor; And it was adjudged, that the said Land so purchased by the said Peise, and demised by Copy, did passe by the said grant to Hardwick. And afterwards, the same Term, the Justices, without any solemn Argument, shewed their opinions in the principal Case, viz. That this Kent did not passe by the bargain and sale made as above, by Anthony Wingfield, to Boban father of the Abbot; for here in the premises of the Abbot is not any matter set forth importing Reputation, or by which it may appear that the Kent in question was ever reputed parcel of the said Mannor, but rather to the contrary, and the bare averment of Reputation in the conclusion of the Abbot is not sufficient to induce Reputation. But if the Abbot had set forth in his Abbot any special matter to induce the Court to conceive a Reputation upon the matter of the Abbot, as to shew that the Bayliffs of the said Mannor had always received the said Kent as parcel of the said Mannor; and as Bayliffs of the said Mannor had accounted for it, as parcel of the Mannor, and that the Lessors of the said Mannor had enjoyed the said Kent as parcel of the said Mannor, the same had been good matter to induce a Reputation, and to have incorporated the said Kent with the said Mannor: and so judgment was given against the Abbot, and of such opinion (as was affirmed by Wray) was Anderson, chief Justice of the Common Pleas, and Manwood, chief Baron of the Exchequer.

Pasch. 26. Eliz. in the Kings Bench.

XIX. Cham and Dovers Case.

Ejectione firmæ.

Customs, ad
pasturandum
non ad colen-
dum.Dower, dis-
charged of a
grant of Co-
py-hold.

In an Ejectione firmæ, the Case was, that one Michell was seised of the Mannor of D, within which diverse parcells of Land, part of the said Mannor, were customary Tenements demised and demisable by copy, &c. according to the Custome of the said Mannor for one, two, or three lives, within which Mannor there was a Custome, scil. that the Lord of the Mannor, for the time being, might grant Copy-hold estates for life in Reversion; The Lord granted such Lands for life by copy in possession, tooke a wife, and granted the same Copy-hold to a stranger in Reversion for life, and dyed, the Copy-holder in possession dyed, the Land demised by copy is (inter alia) assigned to the Wife for her Dower, who had Judgement to recover in a Writ of Dower, who entred and made a Lease thereof to the Defendant, who entred, against whom, the Lessee of the Copyholder brought Ejectione firmæ, and all his matter was found by Verdict, and further found, that every Copy-holder of the said Mannor, might Lease his Copy-hold for a yeare, ad pasturandum, sed non ad colendum, and that the Lease made to the Plaintiff was for a yeare, ad pasturandum. Popham Attor, ney General, of Councell with the Defendant, tooke exception to the Declaration, because the Plaintiff had declared a Lease at the common Law, and the Jury have found a Lease by the custome which cannot stand together: And such a Verdict doth not maintaine the Declaration, as if the Plaintiff had declared upon a Lease for yeares of Lands, and the Jury found a devise for yeares, &c. but the exception was disallowed by the Court: As to the matter in Law he argued, that the Tenant in Dower should hold the Land discharged of the Copy-hold for her life, and he put this case, If the Lord of such a Mannor taketh a Wife, a Copy-holder for life dyeth, the Lord grants a Rent-charge out of the customary land, and afterwards grants the said land by copy for life and dyeth, the wife shall hold the land discharged of the Rent, but the Copy-holder shall be charged, and he put a difference where the Lord grants such Copy-hold in possession, and where in Reversion, for in the first case the Wife shall hold charged, but contrary in the last: And he cited the Case of one Slowman, who being Lord of a Mannor (ut supra) by his Will devised, that his Executors should grant estates by Copy, and dyed having a Wife, the Executors make estates accordingly, the Wife in case of Dower shall avoid them: Plowden contr. the Lord of such a Mannor is bound by recognisance, and afterwards a Copy-holder for life of the said Mannor dyeth, the Lord grants his Copy-hold, de novo, the said new Grantee shall hold his Copy-hold discharged of the Recognisance which Gawdy Justice granted, and by Wray if the Lord of such a Mannor grants a Copy-hold for three lives, takes a Wife, the three lives end, the Lord enters and keeps the lands for a time, and afterwards grants them over againe by copy, and dyeth, the copy-holder shall hold the land discharged of the Dower, and this is a clear case, for the copy-holder is in by the custome which is paramount, the title of Dower and the Heir of the Husband, and by him in the case of the Earle of Northumberland, 17. Eliz. Dyer 344. That the grant of a copy-hold in Reversion by the Earle of Northumberland, doth not make such an impediment as was intended in the condition there, for it is by the custome, and not by the act of the partie: And afterwards, the same Terme Judgement was given for the Plaintiff, that he and his Lessee should hold the lands discharged of the Dower.

Pasch. twenty six Eliz. In the Kings Bench.

XX. *Fringe and Lewes Case.*

DEbt by Fringe against Lewes upon a Bond, who pleaded, that the condition was, that whereas the Defendant was Executor to one Morris Dagle, that if the Defendant should performe, observe, fulfill, and keep the Will of the said Morris Dagle in all points and Articles, according to the true intent and meaning thereof, that then, &c. and pleaded further, that the said Morris by the said Will bequeathed to the Poore of such a Towne ten pounds, to be distributed amongst them, and also to the Churchwardens of the Parish ten pounds, and to I S three pounds, and that he had distributed the said ten pounds to the Poore, and that he had paid the ten pounds to the Churchwardens, and as to three pounds, he said that he is and alwayes was ready to pay the same to the said I S if he had demanded it, upon which there was a demurrer: And as to the ten pounds to be distributed amongst the Poore, the same was holden good enough without shewing the names of the Poore amongst whom the money was distributed; so the pleading of the first payment to the Churchwardens was holden sufficient without naming of them, See 42 E. 3. breif, 539. Scire facias out of a Recovery against Executors, and the Will was challenged, because it was, Scire facias Executor, not naming their proper names; It was holden to be no exception, for Executors are as a corporation known in that, they are Executors and as to the third part of the Plea, scil. alwayes ready and yet is, the plea is well enough, for this Obligation (the Condition of which being general to performe the Will &c.) hath not altered the nature of the payment of the Legacy, but the same remains payable in such manner as befoze upon request, and not at the peril of the Defendant. See 22 H. 6. 37 38. 11 E. 4. 10. 6 E. 6 Br. Tender 60. And afterwards the same Terme, the Court was clear of Opinion, and so delibered the Law to the Counsell on both sides, that in this case the Legacies are to be paid upon request, and not at the perill of the Executors in such manner as they were befoze the Obligation, and afterwards Judgement was given against the Plaintiff.

Pasch. 26. Eliz. In the Kings Bench.

XXI. *Sir John Smith, and Peazes Case.*

Sir John Smith brought Debt upon an Obligation against Peaze, who pleaded, that the Bond was upon condition to performe covenants contained in an Indenture, and shewed what, and that he had performed them, the Plaintiff assigned the breach of one covenant, that where the Plaintiff had leased to the Defendant for yeares, certaine messuages by the same Indenture, the Defendant by the same Indenture did covenant to repair all the said Messuages, alia quam quæ appunctuata forent divelli præscript. dicti Johannis Smith, and shewed further, that the Defendant had not repaired the said Messuages to him demised as aforesaid, and averred that the said house in which the breach of the covenant is assigned, non fuit durante termino predicto appunctuata divelli, and upon that matter of reparation they were at Issue, and found for the Plaintiff: It was moved in Arrest of Judgement, that the Averment in the Replication was not sufficient, for the Lease was made in November to begin the Michael. after, and it might be that the Messuage, in the not repaying of which the breach of the covenant is assigned, was appointed to be pulled down, scil. divelli, befoze the Terme for yeares began, and then the Defendant is not bound to repair it, and then the breach of the covenant is not well assigned, and so the Averment

ment doth not answer the exception, and because this clause (*alia quam*) is in the body of the Covenant, it ought to be satisfied by him who pleads it, *scil.* by him who assigns the breach in the Covenant, in which the exception is contained; as by the Lord Dyer in his argument, in the argument of *Stowels Case*, reported by Plowden 376. Where a man pleaded the *feoffment of Cestuy que use*, he ought to plead, that *Cestuy que use*, at the time of the *feoffment* was of full age, *sanæ memoriæ*, &c. for that is within the purview, contr. upon the Statute of 4. H. 7. in pleading of a *fine*, for that is in a clause by it selfe, which conceit of Plowden, the Lord Wray denied to be Law, for he said, he that pleads the *feoffment of Cestuy que use*, or a *fine* according to the Statute of 4. H. 7. shall not be driven to shew that the *feoffor*, or *Concessor* at the time of the *feoffment*, or *fine* levied was of full age, &c. but he who comes in by such *fine*, or *feoffment* shall shew the same for his own advantage; and at last after many motions it was resolved by all the Justices, that the Averment aforesaid was superfluous & *ex abundanti*, for it had been sufficient for the Plaintiff to have assigned the breach of the Covenant in the not repaying of *Pessuages* without any Averment, *de non appunctuando*, and if the house in the not repaying of which the breach of Covenant is assigned, was appointed to be pulled down, the same shall come in on the Defendants part to whose advantage it trencheth, for such appointment doth discharge the Covenant as to that: In the same Plea, it was moved in way of Judgement, that one Sharpe, Solicitor of the said Sir John in the said suit, had given eight shillings, to the Jurors mean betwixt the Charge, and their Verdict, and that matter was testified by the oaths of two men, upon which the Court examined the said Sharpe, who upon his oath denied the matter, and also the foreman of the Jury to whom the money was supposed to be given, who upon his oath denied the same: And it was moved, if receipt of money by any of the Jurors should make the Verdict void; and by Wray it shall not; for it is but a *disse* wrong, which is punishable on the person of him who takes the money: But Gawdy and Ayliff Justices, the Verdict is void. See 24 E. 3. 24. 14. H. 7. 1. 20 H. 7. 30. And for that cause the Judgement was reversed.

Averment
where super-
fluous.

Pasch. 26. Eliz. Intr. Trim. 25. Eliz. Rot. 492. In the Kings Bench.

XXII. Cordall and Gibbons Case.

In an *Ejectione firmæ*, upon not guilty pleaded this Jury found the speciall matter, viz. that one Hierom Heydon was seised of two *Pessuages*, whereof the Action is brought, and came to Cordall the Plaintiff, and prayed him to lend him ten pounds, Cordall asked him, what assurance he would give him for the repayment of it, he answered, that he would mortgage to him the said two *Pessuages*, whereupon Cordall lent him the money, and afterwards they both went to the said two Houses, and being before the doors, of them, Heydon called Tenants at will of the Houses, and said to them, Sirs, I have borrowed of this Cordall ten pounds upon these Houses, and if I pay this money at Michaelmas next, I must have my Houses againe, and if not, then I bargain and sell these Houses to Cordall, and my will is, that you become his Tenants, after which Heydon put the said Cordall into the Houses, and seating him in the Houses, he put in the keys of the Houses to the said Cordall, by the Windows, &c. And it was adjudged by the whole Court, that this conveyance, by word of mouth, was good enough to passe the estate, *ut supra*, and the words of bargain and sale in this Case, are as strong, as of gift and grant, See 38 E. 3. 11. 43 E. 3. 11. 27 E. 3. 62. 28 E. 3. 11.

Pasch. 26. Eliz. Intr. Mich. 25. & 25. Eliz. Rot. 72: In the Kings Bench.

XXIII. Richards and Bartlets Case.

Dorothy Richards Executrix of A, her former Husband, brought an Action upon the Case upon a promise against Humfrey Bartlet, and declared, that in consideration of two weightes of Coin delivered by the Testator to the Defendant, he did promise to pay to the Plaintiff ten pounds, to which the Defendant said, that after the Assumpsit the Plaintiff in consideration, that the said two weightes were drowned by Tempest; and in consideration that the Defendant would pay to the Plaintiff for every twenty shillings of the said ten pounds three shillings four pence, scil. in toto thirty three shillings four pence, did discharge the said Defendant of the said promise, and averred further, that he hath been alwayes ready to pay the said sum newly agreed, upon which there was a demurrer. And the opinion of the whole Court was clearly with the Plaintiff, first because that here is not any consideration set forth in the Bar, by reason whereof the Plaintiff should discharge the defendant of this matter, for no profit but damage comes to the Plaintiff by this new agreement, and the Defendant is not put to any labour or charge by it, therefore here is not any agreement to bind the Plaintiff, See 19 H.6. Accord, 1.9 E.4. 13. 12 H. 7. 15. See also Onlies Case, 19. Eliz. Dyer, then admitting, that the agreement had been sufficient, yet because, it is not executed, it is not any Bar: And afterwards Judgement was given for the Plaintiff.

Pasch. 26. Eliz. In the Kings Bench.

XXIV. Lendall, and Pinfolds Case.

In Trespasse for breaking of his Close, by Lendal against Pinfold, the Case was that, two broke the Close and entred, and did the Trespasse, the Owner of the land brought an Action of Trespasse against one of them, and had Judgement, and execution accordingly, and afterwards brought Trespasse against the other, and declared upon the same Trespasse: And by Aylliff Justice, it is a good Bar, and he likened it to the case of one Cobham, who brought an Action of Trespasse of Assault and Battery, and recovered and had execution, and afterwards brought an Appeal of Mayhem against the same person upon the same matter, the said Recovery and execution is a good Bar, &c. so here as to the breaking of the close, but not as to the Entry: But by Wray, it is a good Bar for the whole, and he likened it to the case of Littleton, Pl. 376. A Release to one of the Trespassers, shall discharge both, Gawdy agreed in opinion with Aylliff.

Pasch. 26. Eliz. In the Exchequer.

XXV. Kempe, and Hollingbrooks Case.

In an Ejectione firmæ for Tythes, the case was upon the Statute of 18. Eliz. Cap. 6. By which it is enacted, that no Pastors, and Fellows of any Collegiate in Cambridge, or Oxford shall make any Lease for life, or years of any Farme, or of any their Lands, Tenements, or other Hereditaments to the which any Tythes, arable Land, Meadow, or Pasture doth, or shall appertain, unless the third part at least of the ancient Rent be referred, and payed

Tithes in Lon-
don.

in Cozne for the said Colledges, &c. otherwise every Lease without such Reservation shall be void, &c. If now, the said Statute shall be construed to extend to Leases of such extraordinary pecuniary Tithes which are not naturall or paid in kind. It was argued, that the said Statute is to be intended of Tithes in kind, and also of such things to be demised which render Cozne, Hay, &c. But the Tithes in London which is the thing demised in our case, doth not render any such thing, but only money according to the decree made for the payment of Tithes in London in the time of E. 6. And although the words of the Statute be (other Hereditaments) to the which any Tithes, &c. Yet the said Statute doth extend to Tithes in grosse, but they ought to be such Tithes which are of such nature as Tithes of corn, and Tithes of hay: And Manhood chief Baron held clearly, that the Lease of these Tithes is good enough, notwithstanding the defect by the speciall Reservation which is limited and appointed by the Statute, and so by him, a Lease of a House, Kent, Mill, Ferry, &c. are out of the said Statute: And as to the Tithes, notwithstanding the words of the Statute are generall, any Tithes; yet he conceived, the Statute ought to be intended of Tithes of common Right, and not of such customary Tithes as those of London are, and therefore, if all the Parishes prescribe in modo Decimandi, scil. to pay a certaine sum of money for all manner of Tithes, upon demise of such a Rectory, such speciall Reservation is not necessary, for these are Tithes against common Right, and no Tithes are within the purview of the said Statute, but those which are annuall, and therefore a Lease of Tithes of wood is out of the meaning of this Statute, for non renovantur in annum, and he said that upon a Lease of the Tithes of Chirries, a rent ought to be reserved according to the Statute, and the Farmer may bring his Chirries to the Market, and buy Cozne. Suit Justice contrary, for the words of the Statute are generall, and note, that this Lease was of the Rectory of Saint Lawrence in the City of London, there was another matter moved in this case, because the lease whereof the Action is brought, was made by the name of Master or Guardian, and the fellowes, whereas the true name of their Colledge is Master and fellowes. And it was argued by Atkinson, that the same is not such a Misnomer which makes the Lease void, for (five custos) are words of surplusage, v. 7. H. 6. 13. And also the case of the Cookes, 20. Eliz. Plow. 531. The Corporation was by the name of Masters or Governours and Commonalty, mysteria coquorum, &c. And they made a conveyance by the name of Masters or Governours, and Commonalty, artis five Mysteria, &c. the same is no such Misnomer as shall make void the conveyance, for Art and Mistry are both of one sense.

Misnomer.

Pasch. 26. Eliz. In the Kings Bench.

XXVI. Harvey, and Harvey's Case.

Consultation.

CLARE Harvey, one of the Daughters of Sir James Harvy Alderman of London libelled in the Spirituall Court against Sebastian Harvy, Son and Executor of the said Sir James, for a Legacy bequeathed to her by her father; Sebastian did not appear, for which he was excommunicated and taken by a Writ of excommunicat. capiendo, and imprisoned, and afterwards he came into this Court, and surmised to the Court, That the said Sir James in his life had given to the said Sebastian all his Goods and Chattells, and was also bound unto the said Sebastian in Statute-Battle of two thousand pounds, whereupon he had a prohibition, and now the Plaintiffs comcell prayed a consultation, quatenus non agitur ad validitatem facti, aut Statuti. And Egerton Solicitor of Comcell with the Plaintiff cited a Judgment given in the like Case betwixt Lodge and Luddington, where such a special consultation was granted: But Wray put a difference betwixt the said Case and the Case at Barre, for here in this Case is a gift by the

De Rato;

Testator himself, but in the Case cited, the gift was by the Executor; and also here is a Statute of two thousand pounds, in which Case the Obligations which could not passe by the deed, shall be subject to the said Statute.

Trin. 26. Eliz. in the Exchequer.

XXVII. The Duke of Northumberlands Case,

The late Duke of Northumberland seised of five Messuages in the Parish of St. Sepulchres London, in the Tenure of W Gardiner, by deed indented and enrolled for money bargained and sold to I L all his Tenements situate in the Parish of St. Andrews in Holborne in the Tenure of W Gardiner, to have to the said I L for life, the remainder to K his Daughter in Fee: Atkinson. The bargain and sale is void by reason of the Misnomer of the Parish; notwithstanding the truth of the Tenure, for by the grant and bargain and sale of all his Tenements in the Parish of St. Andrews nothing passeth, and the truth of the Tenure subsequent shall not help it: And by Manwood chief Baron, the sale is utterly void, for the falsity doth proceed the truth a certainty: And it was argued, that I L entering by colour of the same bargain and sale is a disseisor; as the Case is betwixt Croft and Howel, 20. Eliz. Com. 517. Yet if he was but Tenant at Will when he made the Lease for years, the same was a Disseisin to the said Duke; and then the Duke being disseised, he is attainted of treason, 10. Mar. And now we are to see what things accrue to the Queen by the said Attainder: and as to that it was said, that at the Common Law a Right of Entry, should Escheat, but not without office found thereof, no more then Lands in possession: And by the Statute of 26. H. 8. it is enacted, that every person attainted of high treason, shall forfeit all his Lands and Tenements which he had of any estate of Inheritance, by which Statute a Bishop, Abbot or Tenant in tail in such Case shall forfeit even without Office: But in the Statute of 33. H. 8. there is a saving to every other person all such right possession, so as in that Case by that Statute the King shall not be in possession without Office, but shall have a right, but cannot enter before Office or after. And he is to have a Sci. facias against him, who hath the possession, and he shall make his defence as well as he can, and the words of the said Statute, That the King shall be in actual possession, shall not be construed to extend to an actual and absolute possession, but such a possession only which he had at the Common Law after Office found, so as the Statute doth not give to the King a larger possession but an easier, without the circumstance of an Office: And of that opinion was Manwood chief Baron, and Shute second Baron: And then it was moved further by Cook, because that the Queen by the Attainder hath but a Right; and the Queen makes the grant of the Messuages themselves, the same grant is void. And he granted that the Queen might grant a real Action, and a Right of Entry; but such a grant ought to be conceived in speciall words, as to say, That the Duke of Northumberland was seised of five Messuages, and by such a one disseised, and after the Duke was attainted, and so granted, for the Queen may grant such a Right by reason of her Prerogative, and therefore the same ought to be granted by speciall words, as in the Case of Mynes in the Commentaries, and according to that was the opinion of the Justices in Cromers Case, 8 Eliz. which Case see, reported by Coke in the Case of the Parquette of Winchester.

Trinit. 26. Eliz. in the Kings Bench.

X XVIII. Dayrell and Thinns Case.

Error.

Edward Dayrell brought a Writ of Error against Sir John Thinns upon a Judgment had by the Defendant against the Plaintiffs Father of the Manor of Mexden: And Error was assigned for want of warrant of Attorney. And the Plaintiff prayed one Certiorare to the cheif Justice of the Common Pleas, and another Certiorare to the Custos Brevium, both which returned, non inveni aliquod warr. and now Sir John Thinn being dead, the Plaintiff brought another Writ of Error by Journeys accounts against John Thynn Son and Heir of the said Sir John Thinn, who appeared and alledged Diminution in hoc, that the Warrant of Attorney is not certified, and prayed another Certiorare unto the cheif Justice of the Bench, and another to the Custos Brevium, and it was argued by Clark, that in this Case Certiorare ought not be granted, for a Certificate is in the nature of a tryal, which shall not be crossed in the same Action; but the parties to the Action, and their Heirs shall be bound by it, especially when the matter is certified by one who is Judge of the Record, and that Certiorare sued at the prayer of the Plaintiff shall be as peremptory, as if it had been sued at the prayer of the Defendant, for the Plaintiff may alledge Diminution as well as the Defendant, 7 E 4. 25. by Yelverton. And a man cannot have Certiorare of a thing which is contrary to the Record, which is certified, 11 E 4. 10. by Lacon: So Diminution cannot be alledged in this Warrant of Attorney, because it hath been certified here, that no Warrant of Attorney is to be found, &c. 9 E 4. 32. by Billiny; Egerton, Sollicitor contrary: For the Certiorare obtained at the sute of the Plaintiff, shall not prevent the Defendant. And the course of proceeding in a Writ of Error, when Error is assigned out of the Record, and not of a thing within the Record, is such: After Error assigned, before that a Sci. fac. issueth against the Defendant ad audiendum errores, the Plaintiff may pray a Certiorare to the Custos Brevium, in whose hands such collateral things remain, for the Plea Roll doth remain in the custody of the cheif Justice, but the Original Writs, Escoines and Warrants of Attorney remain in the hands of the Custos Brevium; and such a Certiorare the Court may grant to the Plaintiff, without making the Defendant party to it. And notwithstanding that the Defendant hath pleaded, in nullo est erratum, and so hath affirmed the Record to be such as is certified, yet the Court ex Officio, shall award a Certiorare to ascertain themselves if there be any such Warrant of Attorney or not: which see 9 E 4. 32. by Billiny, and therefore the Certiorare being awarded, ex Officio, shall not prejudice the Defendant; and to this purpose he cited the Case betwixt the Lord Norris and Braybrook in a Writ of Error, where the Lord Norris being Plaintiff prayed a Certiorare to the Custos Brevium, to certify an Original Writ, upon which a common Recovery was had, and had it, and the Custos Brevium certified, that there was no Original; and afterwards the Defendant prayed another Certiorare, and had it: and so in our Case here especially, because the Defendant was not party to the Record, nor hath day in Court, at the time that the said Certiorare was granted, for the Defendant is not party before the Sci. facias ad audiendum errores be issued against him: and therefore he comes timely enough to pray a Certiorare. See 28 H. 6. 10. and 11. And I grant that the Certificate upon a Certiorare which was awarded after a Sci. fac. ad audiendum errores is peremptory and final, but contrary where it is granted before the awarding of such Scire facias: See Book Entries 271. The Plaintiff assigneth Error in the Original Writ, & petit br. Domini Regis Custodibus Brevium, &c. ad breve illud origin. certificand. and upon the return of the Certiorare, the Plaintiff prayed a Scire facias ad audiendum errores. And see there 293. where it appeareth, fol. 272. that Cer-

tiorare

Certiorare.

tiorare issued at the sute of the Defendant in Error after he had alledged Diminution: and that is after Scire facias ad audiendum errores returned; and see Certiorare before Sci. facias awarded 271, &c. and this Certiorare is only ex officio, and awarded only to enform the Court: And in respect of the Certiorare the cheif Justice of the Common Pleas, to whom the Certiorare is directed, is but a Spinster, and not a Judge. And as to the Case of 9 E. 4. 32. before cited, he could not have a Certiorare, for he could not alledge Diminution, because he had pleaded in Nullo est erratum, by which Plea he had confessed the Record which is certified to be a full and perfect Record, and fully certified, and against that matter he shall not alledge Diminution: And in our Case there is not any such contrariety as hath been objected, for the return of the certiorare is, Non inveni aliquod warrant. not precisely, quod non habetur aliquod warrantum; And therefore if the Court now at the prayer of the Defendant grant another certiorare, upon which is a Return (quod habetur warr. Attornat.) the same is not contrary to the return of the first Certificate, but they both may stand together, for upon further search such Warrant of Attorney may be found: so upon the matter the Court shall not be enbeigled by any such contrariety, for (non inveni aliquod Warrant.) returned upon the first certiorare, and inveni quoddam warr. upon the second certiorare are not meer contrary; And it seemed to Wray cheif Justice, that it would be hard to grant a new certiorare in this Case, but if any variance could be alledged it should be otherwise, as it was adjudged in the Case of one Lassell, who certified no Warrant of Attorney, and afterwards it was moved for another certiorare, as it is here, and because the Original was inter Johannem Lassell's ar. executor. Testi. &c. where he was not named Executor in the first certiorare; upon that matter a new certiorare was granted.

Diminution.

Trim. 26. Eliz. In the Kings Bench.

XXIX. Wichy and Saunders Case.

Wichy libelled against Saunders in the Spiritual Court, and now came Saunders and surmised, that Wichy had libelled against him for Tyths grasse, and shewed, that all the claim that Wichy had to the said Tyths was by a grant made without deed, and by the Law such things would not passe without deed; And also that the Spiritual Court would not allow of this Plea, and therefore prayed prohibition: And the Court upon the first Motion conceived a prohibition should passe, for if the grant be without deed, nothing passed, and then hath not Wichy cause to claim these Tyths against the said Saunders. And notwithstanding that Tyths are quodam modo spiritual things, and so demandable in a Court of that nature; yet now in divers respects they are become a Lay fee, and lay things, for a Wille of Assize of Mortdauces, and in Assize of novel disseisin lyes of them, and a fine may be leyed of them. But it hath been doubted, whether Tyths be devisable by Will: But at another day the matter was moved, and the Court was clear of opinion, that a consultation should be awarded, for whether Wichy hath right or not right to these Tyths, Saunders of common right ought to pay his Tyths, and he ought to sever them from the nine parts, and whosoever takes them, whether he hath right to them or no right, Saunders is discharged: But Saunders may prescribe in modo decimandi, without making mention of any severance, and may surmise, that the Tyths do belong to I S, with whom he hath compounded to pay such a sum for all Tyths, and afterwards a consultation was awarded.

Tyths will not
passe by grant
without deed.

Trin. 26. Eliz. in the Kings Bench.

XXX. Stacy and Carters Case.

Stacy brought an Action of Trespasse for breaking his Close against Walter Carter, and declared of a Trespasse in Somers Land in Tunbridge; The Defendant pleaded, that heretofore he himself brought an Assize of Novel disseisin against the now Plaintiff, and supposed himself to be disseised of his freehold in Lee juxta Tunbridge, and the Land where the Trespasse supposed to be done was put in view to the Recognitors of the said Assize, and further averred, that the Land where, &c. and the Land then put in view is one and the same, &c. upon which there was a Demurrer: Exception was taken to the form of the Demurrer, because in the perclose and conclusion of the Demurrer these words are omitted, Et hoc paratus est verificare. But as to that, it was said by the Court, that the Demurrer was well enough, with or without such Avetment in the conclusion of it, which see oftentimes in the Commentaries, &c. and in the book of Entries 146. the greater part of the Demurrers have not any such conclusion. Another Exception was taken to the barre, because the Defendant pleads, that heretofore Walter Carter had brought an Assize against the now Plaintiff, &c. and that the Land put in view to the Recognitors of the Assize per præfatum Warrhamum Carter, &c. and the Land where, &c. is all one, &c. here is Warrhamum for Walterium, and notwithstanding that, it was after demurrer, and not after verdict, it was adjudged amendable, and as to the matter of the barre, it was said by the Defendants Council, that recovery of Lands in one Town, by precipe quod reddat, is not a barre for Lands in another Town, but where the recovery is by Assize it is otherwise, for there the Plaintiff is general Se lib. tento, and the Plaintiff shall recover per visum Juratorum, and the view is the warrant of the Judgment and Execution. And therefore if a recovery in an Assize be pleaded in barre, not compassed, is not any Plea against it, as in the Case of recoveries upon a Precipe quod reddat; but not put in view, and so not compassed, &c. which proves that the Record doth not guide the recovery, but the view of the Jurors. See 26 E 3. 2. Assize brought of Lands in D, the Tenant saith, that he holdeth the said Lands put in view jointly with A, not named in the Writ, &c. and sheweth the deed of the Joint-tenancy, which speaks of Tenements in B, & the plea holdeth good, because he alledgeth the Joint-tenancy and the Lands put in view: See act. 24 E 3. It was said on the Plaintiffs side, that recovery of Land in Lee juxta Tunbridge could not extend to Lands in Tunbridge, no more then a recovery of Lands in one County can extend to Lands in another County: See 23 E 3. 16. Assize of Novel disseisin brought of Lands in N, the Defendant pleads recovery in Assize, &c. brought before by him against the now Plaintiff of Lands in H, and the same Lands put then and now in view, and adjudged no barre. See also 16 E 3. 16. in an Assize of Tenements in W, the Tenant pleads a Recovery of the same Lands against one A by Assize brought of Tenements in C, which was found by the Assize, & that C is a Hamlet of W, and the Plaintiff notwithstanding that recovery so pleaded had Judgment, for a recovery of Lands in one Town shall not be a barre in an Assize of Lands in another Town. See Br. to Judgement, 66 10 E 3. And the whole Court was clear of opinion, that the plea in barre was not good, for in the Assize which is pleaded in barre in the principal Case, the Tenant there, who is now Plaintiff in this Action of Trespasse, pleaded Nul tort nec disseisin, which plea, as to the freehold in Lee juxta Tunbridge, and therefore it cannot be like to the Case which hath been put off, 26 E 3. for there the Tenant pleaded, that he held the said Lands put in view jointly, for there he agreeth with the Plaintiff in the Lands demanded, the which Lands are put in view,

Averment.

Barre.

view; but if in the Case at barre the Defendant being Plaintiff in the Assize, the now Plaintiff being then Tenant, had pleaded to the Land put in view in barre, and the Plaintiff in the Assize had recovered, now in this Action of Trespasse the Plaintiff in the Assize being Defendant in the Action of Trespasse, might well plead this Recovery in barre, for by his plea in the Assize he hath tyed himself to the view, and to the Land put in view, but it is not so in the Case at Barre, where the Tenant in the Assize pleads, nul forr, nul disseisin, for there he doth not plead expressly to the Land put in view, but to the supposal of the Plaintiff sc. de libero tenemento in Lee juxta Tunbridge: afterwards Wray, with the assent of the other Justices awarded, that the Plaintiff should recover his damages: See by Wray, 44 E 3. 45. in Assize of Tenements in B, the Plaintiff pleads, that he himself brought an Assize of the same Tenements, and his plaint was of Tenements in E, and the same Tenements put in view, and recovered, and holden a good plea, because the Tenant hath said, that the same Tenements were put in view, and that took by Assize, upon which the Plaintiff said, not put in view, and so not comprised.

Trin. 26. Eliz. in the Kings Bench.

XXXI. Benicombe and Parkers Case.

In an Action of Trespasse the Jury found this special matter, that the Grandfather of the Plaintiff was seised, and made a feoffment to the use of himself for life, the remainder to the use of John father of the Plaintiff in tail, the Grandfather dyed, the father entred, and by Indenture by words of bargain and sale, without any words of Dedi & concessi, conveyed the Lands to the use of A in fee, and in the same Indenture was a Letter of Attorney to make Livery, which was made accordingly; and the said A by the said Indenture covenanted, that if the said John should pay before such a day to the said A forty shillings, that then the said A and his Heirs would stand seised, &c. to the use of the said John and his Heirs; and if the said John did not pay, &c. then if the said A did not pay to the said John within four dayes after ten pounds, that then the said A and his Heirs from thenceforth shall be seised to the use of the said John and his Heirs, &c. and the said John covenanted further, by the said Indenture, to make such further assurance as the Council of the said John should advise. Each party failed of payment. John lewyed a fine to A without any consideration, it was adjudged upon this matter a good feoffment well executed by the Livery, notwithstanding that the words of the conveyance are only by bargain and sale; and that the Covenant to be seised to the new uses upon payment, and not payment being in one and the same deed, should raise the use upon the contingency, according to the limitation of it; and Judgement was given for the Plaintiff accordingly.

Trin. 25. Eliz. in the Kings Bench.

XXXII. Bedowes Case.

In an Action of Debt upon a Bill sealed against one Bedow; he demanded Oyer of the Bill, which was, Memorandum that I John Bedow have agreed to pay to R S the Plaintiff twenty pounds, and thereupon there was a Demurrer, first, that the deed wanted the words, In cujus rei testimonium, &c. but notwithstanding that the Court held the deed good, and said so it was lately adjudged;

adjudged: Another matter was because the words of the contract are in the preter tense, I have agreed, but notwithstanding that exception the Plaintiff had Judgement to recover, as by Wray, these words, dedi & concessi, according to the Grammaticall sense imply a quist precedent, but yet they are used as words of a present conveyance, and Judgement was given for the Plaintiff.

Pasch. 27. Eliz. In the Common Pleas.

XXXIII. *Marsh and Smiths Case.*

GEORGE Marsh brought a Replevin against Smith and Pager, who make Countess as Baylies to Ralph Bard, and upon the pleading, the Case was, That Sir Francis Askew, was seised of the Mannor of Castord in his Demesne, as of Fee, which Mannor, did extend unto Daston, North-kelsey, South-kelsey D and C, and had demesnes and services, parcell of the said Mannor, in each of the said Townes, and so seised, granted, totum manerium suum de North-kelsey in Northkelsey, to the said Bard and his Heires, and granted further, all his Lands, Tenements, and Hereditaments, in North-kelsey, and to that grant, the Tenants in North-kelsey did assent; And the Land in which the said Distresse was taken is in North-kelsey; the only question in the case was, if, by this grant to Ralph Bard, a Mannor passed, or not: And the case was argued by the Justices; And Periam Justice argued, That upon this grant no Mannor passed, for before the grant, there was no Mannor of North-kelsey, or in North-kelsey, therefore no Mannor can passe, but the Lands and services in North-kelsey shall passe as in grosse, for they were not known by a Mannor, but for parcell of a Mannor: And a Mannor is a thing which cannot be so easily created, for it is an Hereditament which doth consist of many reall things, and incorporated together before time of memory; common reputation cannot be intended of an opinion conceived within three or four years, but of long time; And appendancy cannot be made presently, but by a long tract of time: As an Abbotsdon in grosse cannot be made by an Act appendant, and the Queen her selfe by her Letters Patents cannot make a Mannor at this day, a multo fortiori, a subject cannot; and the Queen cannot by her Letters Patents without an Act of Parliament annex a Mannor to the Duchy of Lancaster, which see 1. Ma. Dyer 95. And where it is usual, that the Queen doth grant Lands, tenendum de manerio suo de East Greenwich in communum soccagio, if upon the death of such a Grantee without heire, the said Land doth revert unto the Queen in point of Cheat, the said Land shall not be parcell of the said Mannor, for the demur was not parcell of the Mannor in truth, but in reputation: And he cited a case, that the Lord Sturton was seised of the Mannor of Quincamore, and was also seised of the Mannor of Charlton which was holden of the said Mannor of Quincamore; The Lord Sturton was attainted of Felony; and afterwards Queen Mary gave the said Mannor of Quincamore to Sir Walter Mildmay cum suis omnibus iuribus & parcellis, it was adjudged that the Mannor of Charlton did passe, for it is now become parcell of the Mannor of Quincamore, and I grant, that things which goe with the Land shall passe well enough: As if the Queen grant to three Coparceners of three Mannors, the liberty of Warden in all the said three Mannors, they afterwards make partition so as each Coparcener hath a Mannor, and the one of them grants her Mannor, the Grantee shall have Warrant: But if the Queen grant a Leet (ut supra) and the Coparceners make Partition, and each of them hath a Mannor, they shall not have also a Leet, but the Leet which was granted doth remain in common, and there shall not be there, upon such partition, severall Leets: And also I grant that in the case of two Coparceners of a Mannor, if to each of them upon partition be al-

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lotted demeanes and ſervices, each of them hath a Mannor, for they were compellable to make partition by the common Law being in by deſcent, See 26. H. 8. 4. 9 E. 4. 5. contrary of Joint-tenants, for they are in by purchaſe, and were not compellable by the common Law to make partition, & therefore upon partition betwixt them a Rent cannot be reſerved for the equality of the partition: And in every Mannor a Court is requiſite for a Court Baron is incident to a Mannor, but a Court cannot at this day be founded or erected, but it ought to be of long time: And in our Caſe, no Court hath ever been holden in North-kelſey: And if I be ſeiſed of the Mannor of B which extends into C and B, and I grant my Mannor of B in D, now a Mannor paſſeth, and doth extend into D, and the reſidue which is in C ſhall remaine in mee in groſſe, v. 9. E. 4. 17. Catesby; And if I be ſeiſed of a Mannor which doth conſiſt of ſervices, and of twenty free-holders, and one hundred Acres of Demefnes, and I grant the ſervices of my twenty free-holders, & forty or twenty Acres of the ſaid one hundred Acres, a Mannor ſhall paſſe, although it was not granted by the name of a Mannor; but if I grant the ſervices of three, four, or five of my free-holders, and forty or twenty of the ſaid one hundred Acres, upon ſuch a grant no Mannor ſhall paſſe: Windham Juſtice contrary, Wee are not here to ſpeak of the creation of a Mannor, that is a foreign matter, but we are here to conſider upon the diſiſion, and appoitionment of a Mannor, they that have argued in this caſe at the Bar, have ſtood much upon the words of the Conveyance, manerium ſuum de North-kelſey, and that Sir Fr. Askew at the time of that aſſurance, had not any Mannor of North-kelſey, or in North-kelſey, but that is not any reaſon, for if Ceſtuy que uſe (meane betwixt the Statute of 1 A. 3. & 27 H. 8.) will make a feoffment of the Mannor which was in uſe, by theſe words, manerium ſuum, the ſame had been good, and yet it is not manerium ſuum, but the Mannor of the feoffees, but it may be ſaid ſuum, by proceſſe of the profits according to the truſt and confidence repoſed in the feoffees, ſo in our caſe, in as much as Sir Fr. Askew had beſore this grant alſo demefnes as ſervices in North-kelſey, it may colaterally be ſaid a Mannor there, and notwithstanding that tempore conſeſſionis (proprie loquendo) no Mannor was in North-kelſey, yet now upon operation of the Law, upon this grant a new Mannor ſhall riſe; for in diſerſe caſes where a thing which was not in eſſe beſore, upon a grant, may riſe: As if I grant unto you out of my Land a Rent de novo; And alſo a thing which was not in eſſe beſore, may upon a grant take upon it a new nature, as if I, ſeiſed of a great Wood, grant to you Eſtovers out of it, they were not beſore in me but as Woods and Trees, now by this grant they are become Eſtovers in the Grantee, ſo as they are in the Grantee in another nature, then they were in mee: So in our caſe, although North-kelſey was not a Mannor in Sir Francis Askew, yet now upon the grant it is a Mannor in Bard, 9 E. 4. 17. And as to the matter which hath been objected, becauſe a Court cannot now begin, the ſame is not any reaſon, for the Court Baron is incident to the Mannor, and alſo to every part of the Mannor, and tranſitoye through the whole Mannor, and if Sir Francis Askew had ſold all the demefnes of the Mannor in Caſtord, where the Court Baron for the ſaid Mannor had alwayes been held and not elſewhere, yet ſuch a Court might be holden in any part of the Demefnes in any other of the ſaid Townes: The Lord Anderſon, to the ſame purpoſe, it hath been argued of the other ſide, that the Mannor doth not paſſe, becauſe the grant is in theſe words, manerium de North-kelſey, in North-kelſey, I conceive that theſe words (de North-kelſey) are void, as matter of ſurpluſage, and the grant ſhall be conſtrued as if the words had been manerium ſuum in North-kelſey: And a Mannor is ſuch a thing, as may be determined, divided, and ſuſpended: As if the Lord of a Mannor leaſeth for years all the Demefnes of the Mannor, the Mannor is ſuſpended during the terme for

Court Baron.

years, as lately it hath been adjudged. And a warranty may be divided, as if a feoffment in fee be made to two with warranty, and the one of them releaseth the warranty: vide L 5. E 4. 103. A feifed of a Mannor which extendeth in four Towns, B, C, D, and E, and he gives his Mannor in B, C and D by this gift the Mannor and all that is in the said four Towns passeth. And he cited also a Case 21 E 4. 3. The Lord of a Mannor erected a Chappel with, in his said Mannor as a Chappel of Ease, &c. and afterwards it is a Parish Church, now it is become presentable; an Advowson appendant, as the soil upon the which the Church is built is parcel of the Mannor. See 32 H 6. 9. One Mannor may be parcel of another Mannor, as A holdeth of B twenty acres of Land, as of his Mannor of C, which Mannor B holdeth of D, as of his Mannor of E, B dyeth without Heir, so as his Mannor of C is escheated unto D, now the twenty acres are holden of the Mannor of C as they were before, and the Mannor of C is by the Escheat become parcel of the Mannor of E: And by Lease of the Mannor of E it shall passe, and I do not know any difference now between the Case of Parceners, and the Case of Joint Tenants, for now they are both equally compellable to make partition: And he cited the Case of one Estopp. lately adjudged, viz. the Queen was seised of the Rectory of D, which extended into the Counties of Lincoln and York, and the Queen granted her Rectory of D in Lincoln, these are several grants, and now upon the matter they are become several Rectories. And as to that which hath been objected concerning a Court Baron which ought to belong to this new Mannor, and that such a Court cannot now at this day be erected, and therefore here cannot be a Mannor; here needs not the erection of any new Court, but so much as the Court Baron before this grant might be by Law holden in any place within the Mannor: therefore every part of the Demesnes of the Mannor is capable of a Court to be holden there. As where one is seised of a Mannor to which an Advowson is appendant; now is the Advowson appendant not only to the said Mannor but to every part of it, for if he alien an acre, parcel of the Mannor with the Advowson, the Advowson is now appendant to the said acre: See 43 E 3. 26. So in the Case at Barre, because this liberty and franchise of a Mannor is throughout the whole Mannor, and in every part of the Services and Demesnes, upon this grant of the Services and Demesnes in North-kelsey, and of his Mannor in North-kelsey, a Mannor passeth; which Windham also granted and agreed unto. Note, at this time there were but three Judges in this Court: And afterwards Judgment was given for the Defendant.

Pasch. 27 Eliz. in the Kings Bench, rot. 584.

XXXIV. *Allington and Bales Case.*

Allington and others, Executors of Sir W Cordel late Master of the Rolls, brought an Action of Debt against Bales: the Case was this, one Beame being seised of certain Lands, by Indenture, bargained and sold the same to one Platte by these words (give, grant, bargain, sell) and by the said Indenture covenanted with Platte, that the said Platte and his Heires should quietly enjoy the said Lands without interruption of any person or persons: And afterwards certain controversies rising betwixt them concerning the said Lands, the said Beame and Platte submitted themselves to the award and arbitrament of Sir W Cordel, to whom they were bounden severally for the performance of such award, the which Sir W amongst other things awarded, that the said Platte and his Heires should enjoy quietly the said Lands, in eam amplo modo & forma, as the said Land is conveyed and assured by the conveyance and assurance aforesaid: And the truth was, that the said Beame at the time

Arbitrament.

of

of the said Assurance was bounden in a Recognizance of six hundred pounds to one More, 15. Eliz. and afterwards More 16 Eliz. sued a Sci. fac. upon the said Recognizance; and 18 Eliz. the bargain and sale aforesaid was made; and afterwards 19 Eliz. More sued forth Execution by Elegit, and the moiety of the said Land assured to Platte was delivered in Execution to More. And if upon the whole matter the Arbitrament was broken was the question, it was argued by Godfrey, that the Plaintiff ought to be barred, and first, he conceived that these words in the Indenture (give and grant) did not help the Action, for the Lands passed with a charge, and the general words Dedi & concessi, do not extend to this collateral charge, but to the direct right of the Land only, but if a stranger had put out the bargain there, upon such general words, an Action would lie, but as the Case is, they do not give any cause of Action, for the Recognizance was a thing in charge at the time of the Assurance: and yet see 31 E. 3. Br. Warr. Charta, 33. A enfeoffeth B with warranty, who brings a Warrant in Charta and recovers pro loco & tempore, and afterwards a stranger doth recover against him a Rent charge out of the said Land, and it was holden, that upon the matter B should have execution: the special words of the Arbitrament, upon which the Action is brought, are, that the said Platte and his Heirs should enjoy the said Lands in tam ampl. modo & forma, as it was assured and conveyed to the said Platte; ergo, not in more ample manner: and the the said Land was conveyed to Platte, chargeable to the said Recognizance, therefore if Platte enjoy it charged, there is no cause of Action: And as to the Covenant in the Indenture, that Platte and his Heirs should enjoy quietly the said Lands without interruption of any person, the same is a Collateral surety; and the words of the Award are, that Platte shall enjoy it in tam ampl. modo & forma, as it is conveyed and assured by the assurance aforesaid without interruption, these are not words of assurance, for the assurance doth consist in the legal words of passing the estate: scil. bargain sale, Dedi concessi, and in the limitation of the estate, and not in the words of the Covenant: And therefore it hath been adjudged, that if I be bounden to A in an Obligation, to assure to him the Mannor of D, &c. if A tender to me an Indenture of bargain and sale, in which are many Covenants, I am not bound upon the peril of my Bond to seal and deliver it. Also here doth not appear any interruption against the Covenant in the Indenture, for here is not any lawful Execution, for it appeareth here, that More hath sued Execution by Elegit. 4. yeares after the Judgment in the Scire facias, in which case he shall be put to a new Scire facias, for the Sheriff in this Case ought to have returned, that the Conufoz after the Recognizance had enfeoffed divers persons, and shewed who, and upon that matter returned, the Conufoe should have a Sci. facias against the feoffees, vide F. N. B. 266. And the Court was clear of opinion against the Plaintiff.

Trin. 27. Eliz. in the Kings Bench.

XXXV. *Floud and Sir John Perrotts Case.*

FLoud recovered against Sir John Perrott, in an Action upon the Case upon a promise, eighty six pounds, against which Floud one Barlow affirmed a Plaint of Debt in London, and attached the said money in the hands of the said Sir John, and had execution according to the custom of London. And now the said Floud sued a Scire facias against the said Sir John, who appeared, and pleaded the said Execution by attachment; upon which Floud the Plaintiff did demurre in Law: And it was adjudged no plea, for a duty which accrueeth by matter of Record cannot be attached by the custom of London. And notwithstanding that the custom of London be layed generally in aliquo debito, and damages recovered are quoddam debitum, as it was urged by the Coun-
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oil of the Defendant: Yet the Law is clear, that Judgements given in the Courts of the King ought not, nor cannot by such particular customs be defeated & avoided, as it was lately adjudged in a Western Case, damages were recovered, the Sheriff by virtue of a Fieri facias levied the money, which one to whom the Plaintiff was indebted, did attach by the custom, in the hands of the Sheriff; but it was adjudged the attachment was not good, for the custom of attachment cannot reach upon a thing of so high a nature as a Record is; the same Law of Debt upon a Recognizance and Statute, &c. and it was affirmed by Wray cheif Justice, that upon great deliberation it was agreed, by Bromley Lord Chancelor himself, the Lord Anderlon, Mead and Periam Justices, that where a Merchant, having in an Action recovered certain damages, became Bankrupt, upon which issued a Commission upon the Statute of 13. Eliz. of Bankrupts, that such Commissioners could not entermeddle with such damages, to dispose of them to the Creditors, according to the said Statute: But now see the Statute of 1 Jacobi. The Commissioners have power to dispose of such debts, &c.

Trinit. 27. Eliz. in the Kings Bench.

XXXVI. Sir Walter Hungerfords Case.

Grants of the
King.

Election.

In a Replevin by Sir Walter Hungerford, the Case was this, the Queen being seised of a great Waste called Rudesdown in the Parish of Chipnam, granted to the Mayor and Burgesses of Chipnam, the moiety of a Ward-land in the said Waste, without certainty in what part of the Waste they should have the same, or the special name of the Land, or how it was bounded, and without any certain description of it. And afterwards the Queen granted to the said Sir Walter the said Waste, and afterwards the said Mayor and Burgesses by warrant of Attorney under the Common Seal, authorized one A to enter in the said Waste, and in the behalf of the said Mayor and Burgesses to make election of the said moiety, &c. who did so accordingly. And upon this matter given in evidence the parties did demurre in Law, and the Jury were discharged. And it was holden and resolved by the whole Court, that the grant to the Mayor, &c. was utterly void for the incertainty of the thing granted: And if a common person do make such a grant it is good enough, and there the Grantee may make his choice where, &c. and by such choice executed, the thing shall be reduced into certainty: which choice the Grantee cannot have against the Queen, which difference was agreed by the whole Court: And it was further holden, that this grant was not only void against the Queen her self, but also against Sir Walter Hungerford her Patentee. It was further holden by the Court, that if a common person had made such a grant, which ought to be reduced to certainty by Election, and the Corporation to whom the grant was made (ut supra) should not make their election by Attorney, but after that they were resolved upon the Land, they should make a special warrant of Attorney, reciting the grant to them, and in which part of the said Waste their grant should take effect, East, West, &c. or by buttals, &c. according to which direction the Attorney is to enter, &c.

Trinit. 27. Eliz. in the Common Pleas.

XXXVII. Watts and Jordens Case.

In Debt by Watts against Jorden, proccesse continued until the Defendant was Out-lawed, and upon the Capias ut lagatum he appeared and pleaded to issue,

issue, which was found for the Plaintiff, and Judgement given accordingly. ^{Error.}
And now came Jourden and cast in a Writ of Error, and assigned for Error, that he appeared upon the Capias ut lagatum, and pleaded to issue, the Original being determined, and not revived by Scire facias, upon his Charter of pardon; Anderson Justice was of opinion, that it was not Error, for that the Statute of 18 Eliz. had dispensed with it, being after verdict; for the words of the Statute are, For want of any Writ Original or Judicial: Windham Justice contrary, for the Statute doth not extend, but where the Original is imbeselled, but in this Case it is not imbeselled, but in Law determined, and at last the Writ of Error was allowed.

XXXVIII. *Trinit. 23. Eliz. in the Common Pleas.*

The Case was, A seised of Lands by his Will devised, that his Executors should sell his Lands, and dyed, the Executors levy a fine thereof to one F, taking money for the same of F. It in title made by the Conusee to the Land by the fine, It be a good plea against the fine to say, Quod partes ad finem nihil habuerunt, was the question. Anderson conceived that it was: But by Windham and Periam upon Not guilty; The Conusee might help himself by giving the special matter in evidence, in which Case the Conusee shall be adjudged in; not by the fine, but by the Devise: As by Windham. A deviseth, that his Executors shall sell a Reversion of certain Lands, of which he dyeth seised; they sell the same without deed, and good; for the Gender is in by the Devise and not by the conveyance of the Executors: See 19 H 6. 23. And by Periam the Conusee may help himself by pleading, as he who is in by the feoffment or grant of Cestuy que use by the Statute of 1 R 3.

Trin. 27. Eliz. in the Common Pleas.

XXXIX. *Albany and the Bishop of St. Asaphs Case.*

Albany brought a Quare impedit against the Bishop of St. Asaph, who justified for Lapse: The Plaintiff by Replication said, that before the six moneths expired, he presented to the said Bishop one Bagshaw, a Bachelor of Arts and Preacher allowed, &c. The Defendant by way of Responder said, ^{Quare impedit, dic.} that the Church upon the presentment to which the Action is brought is a Church with Cure of Soules, and that the parishioners there are homines Wallici, Wallicam loquentes linguam & non aliam. And that the said Bagshaw could not speak or understand the Welch Language, for which cause he refused him, and gave notice to the Plaintiff of such refusal, and of the cause of it, &c. upon which the Plaintiff did demurre in Law. And first it was agreed and resolved by the whole Court, that in the computation of the six moneths in such Cases, the Reckoning ought not to be according to the Kalender, January, February, &c. but Secundum numerum singulorum dierum, allowing eight and twenty daies to every moneth: Walmesley Serjeant argued for the Plaintiff, and he took exception to the Responder; for in that the Defendant had departed from his Barre, for in the Barre the Defendant intitles himself to the presentment by reason of Lapse, and in the Responder he confesseth the presentment of the Plaintiff, and pleads his refusal of his Clarke, and shewes the cause of it; sc. the want of the Welch Language, which is a Departure: And he cited divers Cases to the same purpose, 27 H 8. 3. In forfeiture of Marriage, the Defendant pleaded the feoffment of the Ancestors of the Heir to divers persons, absq; hoc, that he dyed in the homage of the Plaintiff, the Plaintiff by Replication said, that the said feoffment was made to the use of the said Ancestors and his Heires, the Defendant by Responder saith; that the

the said Antecessor did declare his Will of the said Lands, the same was holden a Departure, for he might have pleaded the same in Barre, and 21 H 7. 17, 18. and 37 H 6. 5. in Trespass the Defendant pleaded, that I S was seised of the Land where, &c. being Land devisable, and devised the same to him and his heirs, the Plaintiff by Replication said, that I S at the time of the devise was within age, &c. The Defendant by Rejoinder said, that the custom there is, that every one of the age of fifteen years might devise his Lands, &c. the same was holden a departure: But to this Exception the Court took not much regard: But as to the matter in Law, it was argued by Walmesley, that the defect of the Welsh Language assigned by the Defendant in the presence of the Plaintiff is not a sufficient Cause of refusal; for notwithstanding that it be convenient that such a Presentee have the knowledge of such Language, yet by the Law of the Land, ignorance of such Language, where the party hath more excellent Languages, is not any disability; and therefore we see, that many Bishops in Wales, who have the principal Cure of Soules, are Englishmen; and the Welsh Language may easily be learned in a short time by converse with Welshmen: And the Statute of 1 Eliz. which establisheth the Book of Common Prayer, ordaineth, that the said Book of Common Prayer shall be put in use in all the Parish Churches of Eng and Wa. without any provision there for the translation of the said Book into the Welsh Language. But afterwards by a private Act it was done, by which it is enacted, That the Bishop of Wales should procure the Epistles and Gospels to be translated, and read in the Welsh Language, which matter our Presentee might do by a Curate well enough: And he conceived, that by divers Statutes, Aliens by the Common Law were capable of Benefices. See the Statute of 7 H 2. Cap. 12. 1 H 5. Cap. 7. 14 H 6. Cap. 6. and before the said last Statute Irishmen were capable of Benefices. Gawdy Serjeant contrary: and he confessed, that at the Common Law the defects aforesaid were not any causes of refusal; but now by reason of a private Act made, 5 Eliz. Entituled, An Act made for the translating of the Bible, and of the Divine Service into the Welsh tongue, the same defect is become a good cause of refusal; in which Act the mischief is recited, viz. That the Inhabitants of Wales did not understand the Language of England, therefore it was Enacted, That the Bishops of Wales should procure so many of the Bibles and Books of Common Prayers to be imprinted in the Welsh Language, as there are Parishes and Cathedral Churches in Wales, and so upon this Statute, this imperfection is become a good cause of refusal. And he likened it to the Case of Coparceners and Joynt-tenants, who now, because that by the Statute of 32 H 8. Joynt-tenants are equally capable to make partition as Coparceners were by the Common Law, now Partition betwixt Joynt-tenants within age is as strong as betwixt Parceners within age. But as to that payment it was said by the Lord Anderson, that it is very true, that upon the said Statute the want of the Welsh Language in the Presentee is now become a good cause of refusal, but because the said Act being a private Act hath not been pleaded by the Defendant, we ought not to give our Judgment according to that Act, but according to the Common Law. Another matter was moved, because here appeareth no sufficient notice given to the Patron after the said Refusal, for the Plaintiff did present the thirteenth of August (the Church voiding the fourteenth of March before) the nine and twentieth of August the six months expired; the fourth of September the Defendant gave notice to the Patron of the refusal, and the fourteenth of September was the Collation, and it was said by the Lord Anderson, that it appeareth here, that there are two and twenty dayes between the Presentment and the Notice, which is too large a delay: And the Defendant hath not shewed in his Plea any cause for the suffering or excuse of it, and therefore upon his own shewing we adjudge him to be a disturber: See 14 H 7. 22. 15 H 76. and note by Periam, it was ad-
 judged

Judged in the Case of Mollineux, if the Patron present, and the Ordinary both refuse, he ought to give notice to the person of the Patron thereof, if he be resident within the County, and if not, at the Church it self which is void.

XL. Mich. 27. and 28. Eliz. at Serjeants Inne:

This Case was referred by the Lords of Council to the Justices for their opinions, I S by Indenture between the Queen of the one part, and himself of the other part, reciting that where he is indebted to the Queen in eight hundred pounds, to be paid in form following, twenty pounds at every Feast of St. Michael, until the whole sum aforesaid be paid, covenanted and granted with the said Queen, to convey unto the Lord Treasurer, and Barons of the Exchequer, and to their Heirs, certain Lands to the uses following, viz. to the use of the said I S and his Heirs, until such time as the said I S, his Heirs, Executors or Administrators shall make default in payment of any of the said sums; and after such default, to the use of the said Queen, her Heirs and Successors, until her Heirs and Successors shall have received of the issues and profits thereof such sums of money parcel of the said debt as shall be then behind unpaid, and after the said debt so paid and received, then to the use of the said I S and his Heirs forever. I S leaveth a Fine of the said Land to the said Lord Treasurer & the Barons, to the uses aforesaid; & afterwards being seized accordingly, by deed indented and enrolled bargain & sale the said Land to a stranger: default of payment is made, the Queen seizeth; and granteth it over to one and his Heirs, quousque the money be paid, and after the money is paid: And upon conference of the Judges amongst themselves at Serjeants Inne, they were of opinion, that now I S, against his Indenture of bargain and sale, should have his Lands again, for at the time of the bargain and sale he had an estate in Fee, determinable upon a default of payment, or supra, which accrued to him by the first Indenture and the Fine, which estate only passed by the said Indenture of bargain and sale, and not the new estate which is accrued to him by the latter limitation after the debt paid, for that was not in esse at the time of the bargain and sale; but if the conveyance by bargain and sale had been by Feoffment or Fine, then it had been otherwise, for by such conveyance all uses and possibilities had been carried by reason of the forcible operation of it.

Hill. 28. Eliz. In the Kings Bench.

XLI. Taylor and Moores Case.

Taylor brought Debt upon an Obligation against Moore, who pleaded in barre, upon which the Plaintiff did demur, and the Court awarded the Plea in Barre good, upon which Judgement the Plaintiff brought a Writ of Error, and assigned Error in this, that the Barre upon which he had demurred, as insufficient, was adjudged good: Upon which now in this Writ of Error the Barre was awarded insufficient, and therefore the Judgement reversed: But the Court was in a doubt what Judgement shall be given in the Case, viz. whether the Plaintiff shall recover his debt and damages, as if he had recovered in the first Action, or that he shall be restored to his Action only, &c. And Wray cited the Case in 8 E 4. 8. and the Case of Attaint 18 E 4. 9. And at last it was awarded, that the Plaintiff should recover his debt and damages: See to that purpose 33 H 6. 31. H 7. 12, 10. 7. Eliz. Dyer. 235.

Debt.
Error.

Hill. 28. Eliz. in the Kings Bench.

XLII. Higham and Harewoods Case.

In an Ejectione firmæ the Case was, that one Butty was seised of the Land where, &c. and also of a Messuage, with which Messuage the said Land had been usually occupied, time out of mind, &c. and being seised lying sick committed a Scrivener to be brought to him, and the said Scrivener being brought to him, he gave him Instructions to make his Will, and amongst other things declared unto him, that his meaning was, that the said Messuage, and all his Lands in Westerfield should be sold by his Executors; and the Scrivener in making of the Will penned the matter in this manner: I will that my house, with all the appurtenances, shall be sold by my Executors, Butty dyed, the Executors sell forty acres of the said Land to the Defendant; and all this matter was found by special verdict, and it was moved by the Plaintiffs Counsel, that the sale of this Land by the Executors is not warranted by the Will: Another matter was moved, scil. admitting that the Executors have authority by the Will to sell the Land, if the sale of parcel of the Land be good and warrantable: As if I make a Charter of Feoffment of ten acres, and a Letter of Attorney to make livery of them to the Feoffee, if the Attorney makes several liveries of the several acres the same is void: But by Cook the Cases are not like, for in the Case put he hath a special Commission, in which the party to whom, and all the other circumstances are set down certainly, contrary in the Case at the Barre, there the Commission is general &c. and peradventure the Executors shall never find a Chapman who will contract with them for the whole. And afterwards upon conference amongst the Judges, Clench, Gawdy and Wray, it was resolved, that by this devise the Land do passe by the sale of the Executors to the Defendant, which sale also by process is warranted by the Will, for by Wray, these words, with all the appurtenances are effectual and emphatical words to enforce the devise, and that both extend to all the Lands especially; because it is found, that the Testator gave to the Scrivener his Instructions accordingly: And afterwards Judgment was given against the Plaintiff. See 3 Eliz. Plowd. 210. Betwixt Sanders and Freeman, there the Devise is pleaded in this manner. Messuagium cum pertinentiis ad illud spectantibus in perpetuum in villa de Arthingworth.

Trinit. 28. Eliz. in the Kings Bench.

XLIII. Watkins and Astwicks Case.

In an Ejectione firmæ, it was found by special verdict, that one Maynard was seised, and made a feoffment in fee upon condition of payment of money on the part of the feoffee by way of Portgage at a certain day, before which day the said Maynard dyed, his Son and Heir being within age. afterwards at the day of payment limited by the Portgage, a stranger at the instance and request of the Mother of the Heir tendered the money to the Portgagee in the name of the Heir being within age, who refused it. And it was resolved by the whole Court, that the same is not a sufficient tender to redeem the Land, according to the Portgage, for it is found by the Jury, that the Heir at the time of the tender was within age, generally, not particularly of six or ten yeares, &c. then it might well stand with the verdict, that the Heir at such time was of the age of eighteen or nineteen yeares, at which age he is by the Law out of the Ward of his Mother, or any other prochein amy, in which

Tender to redeem a Mortgage.

Case

Case it is presumed in Law, that he hath discretion to govern his own affairs : and in this Case the Mother is but a stranger; for the Law hath estranged the Mother from the government of the Heir ; but if the Jury had found that the Heir at the time of the tender was of tender age, viz. within the age of four, teen yeares, in which Case by Law he ought to be in Ward, in such Case the tender had been good.

Trin. 28. Eliz. in the Kings Bench.

XLIV. Lepur and Wroths Case.

A Replevin by Lepur against Wroth ; and declared upon a tortious taking in Burnham in the County of Essex ; the Case upon the pleading was, Replevin. that Robert Earl of Suffex was seised of the Mannor of Burnham in Fee, and leased the same to the King for one and twenty yeares, and afterwards the said Earl dyed, by which the said Mannor descended to Thomas late Earl of Suffex, and he being seised : 4 and 5 Phil. and Mary it was Enacted by Parliament, That the Lady Frances, Wife of the said Earl, by virtue of the said Act of Parliament should have, hold and enjoy, &c. during the widowhood of the said Frances, for and in consideration of the Joynture of the said Frances the said Mannor : Provided alwayes, and it is further enacted, That it should be lawful for the said Earl, by his writing indented, dimissionem vel dimissiones facere pro termino 21. annorum vel infra de eodem Manerio pro aliquo redditu annuali, it quod super omnes & singulos hujusmodi dimissionem & dimissiones antiquis redditus & consuetus vel eo major & amplior reservaretur, and that every such demise should be of force, and effectual in Law against the said Frances for term of her life, if the said term should so long continue : And further the said Act gave to the said Frances, Distresse, Abolozp, Covenant, &c. against such Lessee, and for the said Lessee against the said Dame ; And afterwards the said Thomas, the said former Lease not expired, leased the said Mannor to Wroth the Defendant for one and twenty years, to begin at the Feast of Saint Michael next following (and note the Lease was made the third of April before) rendering three hundred and forty pounds per annum, which was redditus amplior antiquo & usuali. Popham Attorney general argued, that the said Lease did not bind the said Lady Frances, and that for two Causes : 1. because it is to begin at a day to come : 2. because it was made, a former Lease being in esse, and he argued much upon construction of Statutes to be made not according to the letter ; but according to the meaning of them : And he cited a Case upon the Statute of 2 H 3. 3. by which it is Enacted, that in no Action in which the damages do amount to forty marks, any person should be admitted to passe in tryall of it, who had not Lands or Tenements of the cleare yearly value of forty shillings, yet the said Statute shall not be by construction extended, where in an Action between an Englishman and an Alien, the Alien prayeth medietatem lingue ; and yet the Statute is general : So in our Case, although this private Act doth not seem to provide expressly but for two things : 1. the number of the years, 21. & non ultra : 2. antiquis redditus vel eo amplior, yet in reason and good understanding we ought to think, that the intent of the Act was, that the said Mannor should now come to the said Lady Frances surcharged with Leases in Reversion, or to begin at a day to come, for if by this Act the said Earl might make a Lease to begin three moneths after, by the same reason he might make a Lease to begin twenty years after, and also to begin after his death. It hath been objected, that the Lord Treasurer had a Commission to make Leases of the Queens Lands, and that by virtue thereof, he made Leases in Reversion : I know the contrary to that, for every such Lease is allowed by a Bill assigned, and not by the ordinary Commission aforesaid, Leases.

said, the words of our Act are, Demissiones facere pro termino 21. annorum, that it sh^d be meant to begin presently: As if I lease to you my Lands for one and twenty yeares, it shall be intended to begin presently; and he cited the Case betwixt Foxe and Collier upon the Statute of 1 Eliz. concerning Leases made by Bishops: That four yeares of a former Lease being in being, the Bishop leased for one and twenty yeares, the same was a good lease, notwithstanding the former lease, for the lease began presently betwixt the parties. And it hath been adjudged, that a lease for yeares by a Bishop, to begin at a day to come, is utterly void. And he cited the Case of the late Parquesse of Northampton, who by such an Act of Parliament as ours was enabled to make leases of the Lands of his Wife for one and twenty yeares, and of the said Lands an ancient lease was made before the said Act, which was in esse, and before the expiration thereof, he made a lease by virtue of the said Act to commence after the expiration of the former lease, and that lease was allowed to be a good lease, warranted by the said Statute, because that the first lease, which was in esse, was not made by force of the said Act, but if the said former lease had been made by virtue of the said Statute, the second lease had been utterly void.

XLV. Trin. 28. Eliz. in the Kings Bench.

Copp-holder.

Surrender by
Attorney not
good.

A Copp-holder of the Manor of the Earl of Arrundel did surrender his Customary Lands to the use of his last Will, and thereby devised the Lands to his youngest Son and his Heires and dyed, the youngest Son being in prison makes a Letter of Attorneys to one to be admitted to the Land in the Exors Court in his room, and also after admittance to surrender the same to the use of B and his Heirs, to whom he had sold it for the payment of his debts: And Wray was of opinion, that it was a good surrender by Attorney; but Gawdy and Clench contrary: and by Gawdy; If he who ought to surrender cannot come in Court to surrender in person, the Lord of the Manor may appoint a special Steward to go to the prison and take the surrender, &c. and by Clench; Lessee for yeares cannot surrender by Attorney, but he may make a deed purporting a surrender, and a letter of Attorneys to another to deliver it.

Trin. 28. Eliz. in the Kings Bench.

XLVI. Troublefeild and Troublefeilds Cafe.

The Case was, that a Copp-holder did surrender to the use of his Will, and thereby devised the Land to his Wife for life, the remainder over, to his son in tail, and dyed, the Wife entred, and dyed, a stranger did intrude upon the Lands, and thereof made three several feoffments to three several persons, he in the Remainder entred upon one of the said three feoffees in the name of all the Lands to be devised, and made a lease of the whole Land: And by Clench and Wray it was a good Entry for the whole, and by consequence, a good lease of the whole, Gawdy contrary: Note, all the Lands were in one County: See 16 Eliz. Dyer 337. 9 H 7. 25.

Entry.

Trin.

Trin. 28. Eliz. in the Kings Bench.

XLVII. *Parmort and Griffina's Case.*

I*n* Debt upon an Obligation by Parmort against Griffina a Merchant, Debt.
 stranger, the Defendant pleaded, that the Obligation was made upon condi-
 tion for the performance of certain Covenants contained within certain In-
 dentures, and shewed what, &c. and alledged further, that in the said Inden-
 ture there is a proviso, that if aliqua lis, vel controversia oriatur impostorum,
 by reason of any clause, article, or other agreement in the said Indenture con-
 tained, that then, before any sute thereupon attempted, the parties shall choose
 four indifferent persons for the ending thereof, which being done, the Inden-
 ture and Obligation shall be void: And in fact saith, that Lis & controversia,
 upon which the Action is brought, groweth upon the said Indenture, upon
 which there was a demurrer in Law. And because the Defendant hath not
 shewed specially upon what controverſie or strife, and upon what article cer-
 tain: The Court was clear of opinion, that the barre was not good: And
 also the Court was of opinion, that the said Proviso did not extend to subject
 and submit the breach of every Covenant or Article within the said Inden-
 ture to the Arbitrament of the said four persons, but only where strife and
 controverſie both arise upon the construction of any Covenant, &c. within
 the said Indenture; so as the Defendant ought to have shewed such matter
 which fell within the Arbitrament, by the meaning of the said Indenture; and
 Judgment was given against the Defendant.

*Proviso taken
 strictly.*

Mich. 28. and 29. Eliz. in the Common Pleas.

XLVIII. *Partridge and Partridges Case.*

I*n* Dower by Partridge against Partridge, the Case was, that Land was gi-
 ven to the Father for life, the reversion to his Son and Heir for life, the re-
 mainder to the right Heirs of the body of the Father: The Father and Son
 joyn in a feoffment to the Uncle in Fee, scil. to the Brother of the Father.
 The Uncle takes a Wife, the Father dyeth, the Son being his Heir in tail,
 the Uncle dyeth without issue, so as the Land descendeth to the Son, as Heir
 to his Uncle, against whom the Wife of the Uncle brought Dower: It
 was moved, if the Son being Heir in tail to his Father, and Heir also to his
 Uncle, for the Fee descended, be now remitted: for then no Dower accrue-
 th to the Wife of the Uncle, for the estate of which she demands Dower is gone:
 but if the livery in which the Son joyned with his Father be the livery of the
 Son, the same lyes in his way in the impediment and preventing of the Re-
 mitter, so as during his life he shall be adjudged seised of the Lands in Fee,
 simple by descent from his Uncle: When Dower lyeth, for the same estate
 is inherited, of which the Wife demandeth her Dower: And the Court doubt-
 ed, if it were the livery of the Son or not. And note, that the feoffment was
 without deed. See Dyer 16 Eliz. 339.

Dower.

Remitter.

Mich. 28. and 29. Eliz. in the Exchequer.

XLIX. *The Queen against the Lord Vaux and others.*

A Bill of Intrusion was brought for the Queen against the Lord Vaux, Intrusion.
 Rich. Vaux, and Hen. Vaux, supposing to have intruded into the Rectory
 and

and Parsonage of Ethelborough in the County of Northampton, and shewed that in the time of Hen. the fourth, the Colledge of Saint Peter of Ethelborough was founded at Westminster, in the County of Midd. by the name, Decani & capituli, and shewed further, that the Rectory of Ethelborough, was appropriated to the said Colledge, and that afterwards by the Statute of 1. E. 6. the said Colledge was dissolved, and the said Rectory, amongst other possessions of the said Colledge, came to the hands of the King, and that the Defendants, 1. Eliz. intruded into the said Rectory, and took one thousand Sheep, one thousand Calves, and one thousand Loads of Cozne, bona & catalla dictæ Dominæ Regina provenientia ex decimis rectoriæ prædictæ. apud Westm. prædictæ. The Defendants pleaded, &c. That the said Colledge of Ethelborough was founded in Ethelborough, &c. per nomen Decani, canicorum, & fratrum, &c. who leased the said Rectory so appropriated to one Clark for forty six years, in Anno 30. H. 8. who assigned the same to the Defendants, by force of which they justified the taking at Ethelborough, absque hoc, that the said Colledge of Saint Peter in Ethelborough, was founded, per nomen Decani et capituli Ecclesiæ Sancti Petri de Ethelborough, at Westminster aforesaid, & absque hoc, that they took the said Sheep, &c. at Westminster, &c. Upon which the Queens Attorneys did demur in Law. Manwood cheif Baron argued, that Judgement ought to be given for the Queen: Exception hath been taken to the Information, because mention is made in it of a Colledge, and it is not shewed what person was the founder: And also an appropriation is alleadged of the Rectory aforesaid to the said Colledge, and the Appropriation is not shewed certain, who was Patron, Ordinary, &c. as to that he argued, that the alleadging of the Appropriation and foundation, is but matter of surplusage, and therefore the insufficiency of alleadging the same shall not prejudice the Queen, for it had been sufficient to say, That the said Colledge of St. Peter, was seized of the Rectory aforesaid, and then to shew, the Statute of Channtries, 1 E. 6. and the same is a good title for the Queen. The possession of the Colledge, and the Dissolution of it by the Statute: For this Bill of intrusion is but in the Nature of a possessory action, as an action of Trespass, in which case it is sufficient to make title to the possession only, without relying upon the right, but as to the curious and exact pleading of an appropriation, or a foundation, it needs not in this case, for admit that the Colledge were not well and duly founded, yet such pleading is sufficient, for a Colledge in Reputation is within the Statute of 1. E. 6. and where the party claims by or under such foundation, there foundation ought to be certainly shewed not precisely, but conveniently, not as we plead a common Rectory, but as we plead the creation of a Bishop, scil. debito modo præfectus, without shewing the particulars of the creation; so if an Abbot will plead in discharge of his House of a Coroby, he ought to shew the foundation, and convenient certainty, which see L. 5. E. 4. 118. Robert Milam founded the Abby of Leicester, and conveyed the right of the Patronage and foundership to the King by Attainder, and the same was good pleading, without shewing the particulars of the foundation specially, so 3 H. 7. 6. in the Case of the Priory of Norwich, the pleading is, quod Prioratus de Norwich est de fundatione Episcoporum Norwich, for in such case, refert quis sit Fundor, so the King be not founder; but in our case, non refert quis sit Fundor, for whosoever be founder, whether the King, or a Subject, all is one, the Statute in both Cases, gives the possessions to the King: And as to the case of Appropriation, the pleading thereof is well, if it be conveniently shewed in case where the party who shewes it, claims by such Appropriation, as 6. H. 7. 14. 11. H. 7. 8. Concurrentibus his qui de jure, &c. without shewing the particulars of the Appropriation. Now in our case, the Queen is merely a stranger to this Appropriation, and shewes not claim by it, but the possession of the Colledge is the title of the Queen, by the Statute of 1. E. 6. and therefore it

Foundation.

Colledge in
Reputation,

Generall
pleading.

it sufficeth, for the Queen to shew that the Colledge was seised, &c. without making mention of the manner of the Appropriation: And as to the traverse of the County, he conceived, that the County is not traversable in this case, for when the tythes are severed from the nine parts, they are presently vested in the party who hath right, and they are things transitory, and also the taking of them, for the party may take them in any place as well as in his own Parish, scil. as well at Westminster, where the Queen supposeth the taking, as at Ethelborough where the Defendant doth justify, &c. and in such cases the place where is not traversable, See 9 H. 6. 62, 63. by Babbington, 35. H. 6. 5. In Trespasse of Goods taken in the Parish of Saint Clements, in the County of Midd. the Defendant did justify by buying in open Market in the County of Essex, there needs no traverse, for the Defendant hath made title by an open Market, 34. H. 6. 14, 16. In Trespasse of Battery at D in the County of Essex, the Defendant pleaded, that the Plaintiff made an assault upon him at B in the County of Kent, and the Defendant fled, and the Plaintiff pursued him continually unto D aforesaid, at which place the Defendant did defend himselfe, and so the hurt which the Plaintiff had was of his owne assault, and demanded Judgement if Action, the same is a good Plea without traversing of the County, for a Battery may be continued from one County to another. And it was observed by Manwood in citing of that case, that although, prima facie mirum videri potest that a Battery may be continued from Essex into Kent, because the River of Thames is betwixt them, and yet, re intellecta, it is plaine, for one parrell of Land containing thirty Acres of Lands of the Coasts of Essex is within the County of Kent, see also 34. H. 6. 5. by Prisoit, In trespassse of Goods taken at Coventry, the Defendant doth justify the taking because the Plaintiff gave the said Goods to the Defendant at London, by force of which he took them at London, absque hoc, that he took them at Coventry, and that traverse not holden good for the Defendant by such a gift might justify the taking of the Goods in any place as well as in the place where the gift was made, but if in such case, the Defendant had pleaded, that the Plaintiff delivered the said goods to him at London to deliver them over to A, by force of which he took them at London, and delivered them over accordingly, in such Cases the Defendant may well traverse the place supposed by the Declaration, for by his Plea he hath confessed an immediate delivery of the said goods to him by the Plaintiff, and the delivery and the taking all at one time and at one place, and it had not been a good plea for the Defendant to say, that the Plaintiff delivered to him the said goods at London, by force of which he took them at Coventry, for the possession is confessed by the first delivery of the goods at London, & the supposal of the Plaintiff of a taking in Coventry, and the justification of the Defendant of a taking by reason of a delivery at London, cannot stand together. But if the Defendant plead, that the Plaintiff gave to him the goods at London, by force of which he took them there, there he may take a traverse to the place supposed by the Declaration, for by the gift it is lawful to the Defendant to take the goods in any place. So see 19 H. 6. 35. In false Imprisonment supposed in the County of W, the Defendant doth justify as Sheriff of the County of B, by force of a Writ to him directed to attach the Plaintiff, and so he attached him and imprisoned him at C in the said County of B, there the Defendant traversed the County supposed by the Declaration, for otherwise he doth not meet with the Plaintiff, and the authority of the Defendant doth not extend to the County supposed by the Declaration. See also to the same purpose 22 E. 4. 39. by Husley, where the difference is taken when justification is by reason of a Warrant to take goods in any place whatsoever, and where in a place certain, as to the traverse of the Foundation, absq. hoc, quod predictum Collegium Fundatum fuit per nomen Decani, & Capituli Ecclesia collegiatae Sancti Petri de Ethelborough apud Westm. he hath here

here traversed that which was not alledged, for the placing of the last words of the traverse, scil. apud Westminst. in the end of the traverse seems by common construction to be intended thereby, that there is no such Colledge at Westm. and not that the Colledge was not founded at Westm. for then the traverse should be, absque hoc, quod collegium predictum fundatum fuit, at Westminstet, per nomen, &c. But the most proper traverse, that the Defendant could have taken in this case had been, absque hoc, quod Decanus & Capitulum Ecclesie collegiat. de Echelborough was seised, for the corporation mentioned in the Bill, and that which is mentioned in the Bar, are not all one, but differ in this manner, scil. in the Bill the Dean and Chapter, &c. in the Bar the Dean, Canons, and Brethren, and perhaps there are two such Corporations, and then both cannot be seised, and therefore upon the seisin of one of them, the traverse shall be taken: And afterwards Judgement was given for the Queen.

Mich. 28. and 29. Eliz. In the Common Pleas.

L. The Queen, against the Bishop of London, and Scot.

Quare impedit. The Queen brought a Quare impedit against the Bishop of London, and Scot, and the Case was, that A seised of an Advowson in gross, holden of the Queen in chief, aliened the same by fine without Licence; the Church became void, the Conussee presented, The Queen without office found, brought a Quare impedit, the question was, if the Queen without office found should present; And it was argued by the whole Court, that if the Alienation had been by deed only, that there the Queen without office found should not have had the presentment, for upon such an Alienation by matter in fact, without Licence no Scire facias should issue without office found of the Alienation, but upon an Alienation without Licence by matter of Record, a Scire facias lyeth before office, which was granted by the whole Court: And in the last case the Queen shall have the meane profits from the time of the Scire facias returned, but in the first case from the time of the office found, See for that Stamford Prerogative, fol. last but one, 8 E. 44. It was also moved, if the Queen intituled to the presentment as above, pardoneth to the Conussee all Alienations without Licence, and Intrusions, if the estate of the Incumbent be thereby confirmed, but the Court would not argue that point; but it was adjourned untill another day.

Mich. 28. & 29. Eliz. In the common Pleas.

L. I. Braybrooks Case.

Fines levied. The Case of one Braybrook was moved, which was, Land was given to A for life, the Remainder to B for life, the Remainder to the said Braybrook in fee: B being in possession levied a fine to a stranger, sur consens de droit come ceo, &c. A dyed, if now Braybrook might enter for the forfeiture, was the question: And it was agreed by the whole Court, that by that fine the Remainder in fee is not touched, or discontinued, but because B had done as much as in him lay for the disposing of fee-simple by the fine, and hath taken that upon him, the same amounts to a forfeiture: And it was also agreed by Anderson and Periam, that if Tenant for life in possession levied a fine, &c. if the Lessor doth not enter within five years after he shall be bounden: Windham contrary, for by him it is in the election of the Lessor to re-enter immediatly for the forfeiture, or to expect the death of the Lessee.

Mich.

Mich. 28. & 29. Eliz. In the Exchequer Chamber.

LII. Willshalge and Davidge: Case.

Willshalge brought Error in the Exchequer Chamber, upon the Statute of 27. Eliz. Cap. 8. against Davidge, upon a Judgement given in the Kings Bench, Hill. 28. Eliz. and assigned for Error, that where Davidge had heretofore brought Debt against the now Plaintiff, and declared upon diverse Contracts, scil. that he had sold to Willshalge such Merchandizes for so many Portagues, and such Merchandizes for so many Ducats, which in toto amounted to seven hundred pounds Sterling. which sum he demanded, scil. in Sterling money, and not in Ducats and Portagues, according to the Contract; And upon the Declaration the said Willshalge had demurred in Law, and the Court gave Judgement for the Plaintiff, for it is in his election to divide his debt in which of those Coynes he pleases, either in the proper coyne of the Contract, or of Sterling, scil. in currant money. And afterwards the said Judgement was affirmed. Error.

Mich. 28. & 29. Eliz. In the Exchequer.

LIII. Henly and Broads Case.

Henly brought Trespasse against Broad in the Kings Bench, and declared, that the said Defendant, simul cum quodam I S clausum suum fregit, &c. Trespasse.
The Defendant pleaded to Issue, and it was found for the Plaintiff, and it was objected in Ray of Judgement, that the count was not good, for it appeareth therein, upon the shewing of the Plaintiff himselfe, that the Action ought to be brought against another also, not named in the Writ, and because the same appears of the Plaintiffs own shewing, the Declaration was not good, and notwithstanding that said Exception, Judgement was given for the Plaintiff. Upon which Broad brought a Writ of Error, and assigned the same matter for Error; And there the Case of 2 H. 7. 16. 17. was cited, Error.
where a difference is taken, where the Plaintiff declares, that the Defendant with one B did the Trespasse, him naming in certain, and where the Declaration is, that the Defendant, cum quibusdam alijs ignotis, &c. vi. 8 H. 5. 5. And at length all the Justices of the common Pleas, and Barons of the Exchequer were clear of opinion, that by the common Law the Declaration was not good, for the reason, and upon the difference aforesaid: but if in Trespasse against one, who pleads that the Trespasse was done by himselfe and one B, to whom the Plaintiff hath released, and the Plaintiff traverse the Release, in that case, for as much as the matter doth not appear upon the Plaintiffs own shewing, but comes in on the part of the Defendant, and not denied by him, the Declaration is good enough: And it was further agreed by them all, that now this defect after Verdict is helped by the Statute of 18. Eliz. for it doth not concerne substance but only forme: And afterwards the first Judgement was affirmed. Counts.

Mich. 28. & 29. Eliz. In the Common Pleas.

L I V. Wood and Fosters Case.

Replevin.

Wood brought a Replevin against Humfrey Foster and others; and made his plaint of the taking of one thousand Cattel; Foster pleaded, Non cepit; and the others, that the property was in another; upon which matters they were at issue. And as unto the first issue, the Case upon the Evidence was: That the late Lord Windfore was possessed of certain Sheep, and by his Will devised them unto Eliz. his Daughter for her advancement in marriage, and of his Will made his Wife his Executrix, and dyed, his Wife took to her Husband one Puttenham, who being thus possessed leased the said Sheep with a Farm for eleven years by Indenture, upon which it was agreed between the said parties, that the Lessee should keep so much of the Kent reserved upon the said Lease, to buy therewith so many Cattel over, so as the whole stock of the said Sheep upon the said Farm should amount to the number of one thousand Cattel; and the Lessee also covenanted to yield and render to the said Puttenham at the end of the said Term one thousand Sheep between two years thorne, and four years thorne. Afterwards Puttenham by his deed gave unto one A, who had married the said Eliz. the said one thousand Cattel, to have them after the said Term; the Term expired; Puttenham sold and granted them unto Wood, who brought them away with him. And the said A pretending that the said Sheep passed to him by the said grant of Puttenham during the said Term, seised them, and the same was no longer as they were divided in the high-way, unde magna contentio orta fuit between the said parties, the one charging the other with felony, whereupon the Constable of the Town where, &c. supposing the said matter would grow to an Outrage, seised the said Cattel as felons goods, and afterwards went to the house of the said Foster, which was near unto the high-way, and asked his advice upon the matter, but he would not meddle therewith: Afterwards one Perkins, who had bought the said Cattel of the said A, came to Foster, and shewed to him, that the high-ways there were not sufficient for pasturage of the said Cattel until the said controversy be determined, and prayed that the Cattel be delivered to him the said Perkins to keep in the mean time, to whom Foster answered, that if the said Perkins would find sufficient sureties to deliver back the Cattel to him who had right, that he would be content the said Perkins should take them; whereupon the said Perkins was bound to Foster to that purpose, and took away with him the said Cattel. And it was also given in Evidence, that the servants of the said Foster had seised the Cattel for the use of their Master. And by the clear opinion of the Court upon the whole matter shewed, Foster, Non cepit, and according to such direction of the Court the Jury found, that Foster, non Cepit; and as to the matter of property, the Court was clear of opinion, that the grant made by Puttenham of the said Cattel, during the Term, was utterly void, for Puttenham during the same Term had not in the said Cattel either a general or a special property, nor also after the Term, but if after the Term expired, the Lessee will not according to his covenant deliver to Puttenham one thousand Sheep then Puttenham is put to his Action of covenant, for here the Lessee was bound to deliver to Puttenham at the end of the Term, not the same Cattel which were leased, but such a number of Sheep, and the same ought to be between two yeares thorne, and four yeares thorne, which could not be the Sheep demised, for they did exceed such degree before the end of the said term, and then the grant of Puttenham during the Term is merely void: And then when after the Term, the Lessee, according to the covenant, delivered to Wood one thousand Sheep, he might well sell them to the Plaintiff; And such was the

the opinion of the whole Court, and it was said by Justice Windham, that if I let certain Sheep to one for two yeares, now upon that Lease somewhat re-
Property.
maines in me, but that cannot be properly said a Property, but rather the possi-
bility of a Property which cannot be granted over. See 11 H. 4. 177. 178.
22 E. 4. 10. 11. In the same plea it was also holden, that in a Replevin where
the plaint is of one thousand Beasts, and the Defendant justifies by reason of
property, upon which the parties are at issue; Now upon the Evidence the
Defendant may surmise a lesser number of Beasts, and oblige the Plaintiff to
prove a greater number then that which the Defendant hath confessed upon
the Evidence. Notwithstanding that the number set down in the plaint be
by the plea of the Defendant quodum modo admitted, and the lesser number
surmised, and the contrary not proved shall go in mitigation of the damages,
and the Jury shall conform their verdict in the right of damages, according to
the proof of the number, notwithstanding that the number set forth in the
plaint be not by the plea denied by the Defendant, and so it was put in ure in
this Case: for the Plaint was of the taking of one thousand Cattel, but the
proof extended but to eight hundred sixty five. Note also in the same Plea it
was holden, that whereas one Chock was returned upon several Juries in this
several Courts at Westminster, and both the Juries are adjourned to one day,
now in which of the said two Courts the said Chock was sworn, he shall be dis-
charged of his attendance at the other Court the same day.

Mich. 28. and 29. Eliz. in the Common Pleas.

L V. Carters Case.

Carter brought an Action upon the Case against I S, and declared, that A
was possessed of certain Lands for years, the Inheritance thereof being
in the Wife of the Plaintiff, upon which Lease a Rent was reserved: the Assumpsit:
Defendant, in consideration that the Plaintiff would procure the said A to
assign the said Lease to the Defendant, promised to pay the said Rent to the
Plaintiff for all the residues of the Term: It was objected, that upon this
matter the Action doth not lie, because that the Plaintiff hath a higher remedy,
scilicet an Action of Debt or Distresse: but the opinion of the whole Court was,
that the Action did lie, for here upon the promise an Action is given to the Hus-
band alone in his own right, whereas the Rent is due to the Husband in the
right of his Wife in its nature, and the Rent is also to be paid for the Land,
But upon this Assumpsit it is payable to the person of the Husband: And af-
terwards Judgement was given for the Plaintiff.

Mich. 28. & 29. Eliz. In the common Pleas.

L V I. Kimpton, and Bellamy's Case.

George Kimpton brought a Replevin against Wood and Bellamy, who
make Conusance as Baylies to George Burgain for Damages feoffance,
the Plaintiff in Bar of the Conusance, sheweth, That he himselfe, and all
those whose estate he hath in one hundred and forty Acres of Land, time out of
Replevin.
mind, &c. have had common for all manner of Cattell in six Acres of Land
whereof the place where. &c. is parcell, and so put in his Cattell, &c. against
which, the Defendants say, that the Plaintiff, &c. had common in forty Acres
of Land, whereof the said six Acres are parcel, all lying in Communi campo,
and that the Plaintiff, a long time before the taking, had purchased two Acres
parcel of the said forty Acres, &c. upon which there was a demurrer in Law:

Traverse.

Extinguishment.

It was argued by Serjeant Shuttleworth, that the Replication to the Bar to the Abolition is not good, for in the Bar to the Abolition, the Plaintiff hath shewed, that he hath common in six Acres, and the same shall be intended common in the six acres only, for common in forty acres cannot be the common in six acres; as 35 H. 6. 38. In Debt for Kent reserved upon a Lease for years, the Plaintiff declared that he leased to the Defendant ten acres of Land, rendering the Rent in demand, the Defendant pleaded, that the Plaintiff leased to him the said ten acres, and also such a Rectory, rendering the same Rent. the same is no plea without traverse, absque hoc, that he leased the ten acres only: See Dyer 29 H. 8. 32. And the whole Court was clear of opinion, that for want of such traverse, the plea is not good, for by Periam the Common supposed in the barre to the Commons out of the six acres, cannot be intended the Common supposed in the Replication, scil. out of the forty acres. And by him, If in Trespasse the Defendant justifies by reason of common in six acres of Land, upon which the parties are at issue; and the Defendant in Evidence shews, that he hath common in forty acres, whereof the said six acres parcel, the same doth not maintain his title, but the issue shall be found against him: But by the Lord Anderson, because that this Demurrer is general, the other party shall not take advantage of that defect of pleading, for the want of the Traverse, and that by reason of the Statute of 27 Eliz. for Traverse is but matter of form, and the want of the same shall not prejudice the other party in point of Judgement, but the Judges ought to judge upon the substance, and not upon the manner and form of the pleading: And as to the matter of the Common, the Court was clear of opinion, that by the purchase of the said two acres, the whole Common was gone.

Mich. 28. and 29. Eliz. in the Common Pleas.

L VII. Knights Case.

Debt.

Abatement of
Writ.

K Night brought Debt against three Executors, and now surmised by his Counsel, that one of the Executors is dead, pendant the Writ; and prayed the opinion of the Court, if the Writ should thereby abate or not, for by some it is not like where a Writ is brought against two Executors, for there if any of them dyeth, pendant the Writ, it shall abate, for now the plural number is gone; for there is now but one Executor, but in our Case the plural number continues: But notwithstanding that, the Court was clear of opinion, that the Writ should abate: Wherefore the Plaintiff seeing the opinion of the Court, prayed that upon his surmise aforesaid, he might have a new Writ by Journeys Accounts, which was granted to him.

Mich. 28. and 29. Eliz. in the Common Pleas.

The Queen and Middletons Case.

Quare Impedit.

The Queen brought a Quare Impedit against Middleton, and counted, that W. Lord Say was seised of the Mannor of Beddington in the County of Hertford, to which Mannor the advowson of the Church was appendant, & ad Ecclesiam predict. presentavit Coo Clericum suum, and afterwards dyed seised, having issue two Daughters, Mary married to the Earl of Essex and Ann to the Lord Mountjoy, who make partition, and the said Mannor of Beddington, inter alia, was allotted to the said Mary for her part; and afterwards the said Earl and Mary dyed, having issue Ann, who took to Husband the Marquess of Northampton, and afterwards 33 H. 8. a fine was leved of the

the said Panno; inter &c. Querent. and the said Parquells and Ann Defor-
ceants, by which Fine the said Panno; was granted and rendered to the said
Parquells for term of his life, the remainder to the said Ann his Wife in
tail, the remainder over to Hen. the eighth in fee; the Parquells is attain-
ed of High Treason, by which the King seised, and afterwards Ann dyed with-
out issue, after which in the seisin of the Queen that now is the Church void-
ed, by which it belonged to the Queen to present; The Defendant did con-
fesse the seisin of the Lord Say, and the whole matter contained in the Count
until the Attainder; and pleaded further, that after the said Attainder Queen
Mary leased the said Panno; with the advowson to Rotchester and Walgrave
for forty yeares, if the said Parquells should so long live, who were possessed
accordingly, and in their possession the Church became void, to which Avoid-
ance one Twinko did present the Defendant, who upon his presentment was
instituted and inducted: Upon which Plea the Queens Serjeant did demurre
in Law. It was argued by Serjeant Shuckeworth for the Queen, That the
counter-pleading of the title of the Queen by the Incumbent, without shew-
ing title in his own Patron could not be good, notwithstanding the Statute of
25 E 3. Cap. 7. before which Statute, the Incumbent could not plead any
matter which went to the right of the Patronage, but only in discharge or ex-
cuse of the disturbance, and therefore we ought to observe the words of the said
Statute, sc. the possessor shall be received to counter-plead the Kings title,
and to have his Answer, and to defend his Right upon the matter, although he
claim nothing in the Patronage; upon all which words taken together it ap-
peareth, that the Incumbent ought not only counter-plead the title of the
King, but also ought to shew and defend his own right, and that hath not the
Defendant done here; For Twinko, of whose presentment he is in the
Church, doth not claim under the lease made by Queen Mary to Rotchester
and Walgrave, but during their said Lease and their possession of it, by usurpa-
tion presented the Defendant, 46 E 3. 13. by Finchden: The King brought
a Scire facias upon a Recovery in a Quare Impedit, the Defendant being In-
cumbent pleaded, that after the said Judgement the King had presented to the
said Church I S his Clark, who was admitted accordingly; and exception
was taken because the Defendant did not shew a title in himself to maintain
his possession, but it was not allowed; for a difference is taken betwixt a Plea Where in
in a Quare Impedit, and a Plea in a Scire facias, for in a Scire facias it is suffi-
cient to extort the Plaintiff of execution without any title, contrary in a Quare
re impedit: And it is a general Rule, that in all Cases where an Office is to
be traversed, none shall be received to traverse the title of the King, without
making a title to himself, which see 38 E 3. 18. So in the Case of the Lady
Wingfield, 3 H 7. 14. and Stamford 63. 64. And it is true in Actions re-
all; it is sufficient to traverse the title of the Demandant, without making ti-
tle to the Tenant himself: As in a Formdon, Ne dona pas; But in Actions
personall it is otherwise, as 2 H 4. 14. In Ravishment of Ward, it is not
sufficient to traverse the title of the Plaintiff, but the Defendant ought also to
make title to himself: Fenner Serjeant contrary: who took exception to the
Writ, because it is brought against the Incumbent only without naming the
Patron or Ordinary: For here the Defendant hath pleaded, that he is Par-
son impesonator of the Church aforesaid of the presentment of the said Twinko,
and that he is admitted, instituted and inducted, and hath continued in his
Church so many dayes and years, in which Case the Writ ought to have been
brought as well against the Patron and Ordinary, as against him the Incum-
bent: But in some Cases it is sufficient against the Incumbent only, as up-
on a Collation by Lapse, 9 H 6. 32. by Babbington: So where the Defen-
dant is disturber without any presentment, 7 H 4. 93. so where the Defen-
dant was deprived, and kept himself in 4 E 4. 18. So where the Pope
makes Prohibition, 11 H 4. Quare Impedit 120. So a Sci. fac. upon a Reco-
very

very in a Quare Imped shall be brought against the Incumbent only. H 5. 8. for by the Judgement in the Quare impedie, the right of the Patronage is bound; and the Scire facias is only for the possession which concerns the Defendant only, and no other. And to prove that by the Common Law, a Quare Impedie lay not (but upon such special matter) against the Incumbent alone, it is clear upon the said Statute of 25. E 3. For before the said Statute the Incumbent could not plead any matter which did trench to the right of the Patronage, and therefore we ought not to presume, that the common Law was so unreasonable, to give an Action against a singular person, who could not by the Law shew and defend his own right, nor traverse the right of the other party: And as to the plea here, he conceived that the same plea which the Patron might have now after the Statute of 25 E 3. the Incumbent shall have; but he who is only a disturber not in by presentment, &c. he shall not plead any matter but in discharge or excuse of the disturbance, 47 E 3. 8. The King in a Quare Impedie counted. That King H was seised, and presented one A, King H dyed, and the Abbotsdon descended to King E 3. A dyed, the now King presented B, and now B is dead, so it belong to the King to present, that the Defendant being Incumbent traversed the institution and induction of B, without making title to himself. So 44 E 3. 19. in a Quare Impedie the King declared that he himself was seised and presented one B, who at his presentment was received, &c. B dyed, by which it belonged to the King to present; to which the Defendant being Incumbent pleaded, that the said B is yet alive, and that plea was allowed without other title made to himself. Note, that at the first Argument of this case, that the Court was of opinion against the Defendant, because he had not in his plea any interest in the Abbotsdon, and by Periam the Patron himself could not have had such plea if he had been party to the writ, therefore not the Incumbent; and it is no good pleading in any Action, to discover in pleading any wrong, as force, disseisin, usurpation; But at the length Mutata opinione, all the Justices were agreed, that Judgment should be given against the Queen: And the Lord Anderson shewed openly, the reason of their Judgement, for here is not bare usurpation pleaded against the Queen, but also an estate, scil. a lease for yeares in the said Abbotsdon derived from Queen Mary, and that the Avoidance upon which the Action is brought falleth within the said Term, so as the Queen who is Plaintiff is encountred with the Lease of her Ancestors, against which she cannot make title to present, without special matter; wherefore Judgment was given against the Queen.

Mch. 8. and 29. Eliz. in the Common Pleas.

LIX. Kyniers Case

Debt.

KYnter brought debt upon an Obligation, the condition was, that whereas the Plaintiff had bought of the Defendant a Ship, if then the Defendant shall enjoy the said Ship, with all the furniture belonging to the same, without being disturbed for the said Ship or any furniture appertaining to it, that then, &c. and the Case was, that after the sale of the said Ship a stranger sued the Plaintiff for certain moneys due for certain ballast bought by the Defendant for the same Ship and put into the said Ship before the sale of it, and in the said sute the Plaintiff obtained a Judgement and Execution, and thereupon the said Ship was seised, and all the matter was, if Ballast be furniture of a Ship or not: And it was moved by Serjeant Gawdy, that it was; for Ballast is as necessary to a Ship as a Sail; but the Court was against him, for sometimes a Ship may sail without Ballast, for it may be laden with such Merchandizes which are convenient Ballast in themselves, as Coals, Wheat,

Wheat, &c. Periam at the first doubted of it : and by him, if I be bound upon condition, ut supra, I am bound to deliver the Curis being in it at the time of the sale, but yet he conceived, that the Plaintiff should be barred because he had not specially shewed, that at the time of the sale, that the ballast was in the Ship.

Mich. 28. and 29. Eliz. in the Common Pleas.

LX. Pendleton and Gunstons Case.

Pendleton informed against Gunston upon the Statute of 13 Eliz. Cap. 5. for that, where the said Pendleton had before brought a plaint of Debt against I S in the Guild-hall of Norwich, upon which issued out of the said Court an Attachment against the said I S, by which the Sheriff of Nor. being ready by virtue of the said proceſſe to attach the said I S by his goods, there, the now Defendant in disturbance of the said proceſſe and the execution of it, did publish and shew to the Sheriff a conveyance, by which he claimed the said goods as conveyed to him by the said I S, &c. and averred the fraud, &c. and it was moved by Serjeant Snagg, that the matter of which the Defendant is charged is not within the said Statute, because the avowing of the said conveyance doth not go in delay of the execution, for no Judgment is given but only in delay of proceſſe; but the Court was clear of opinion to the contrary, and that by reason of the Statute and the words of it, scil. delay, hinder, or defraud Creditors of their just and lawful Actions, sales, &c. for here is a delay, for want of serving the said Attachment, the Appearance of I S to the suite of the Plaintiff is delayed, which mischiefe is within the remedy of the said Statute. And Periam and Rhodes Justices conceived, that such a bowing of such conveyance, where no suite is depending is within the said Statute, which Anderson doubted. See the pleading of this Case reported in the second Book of Entries, 207, 208. 30 Eliz. per quod secta suit, impedita suit, &c.

LXI. *Mich. 28 and 29. Eliz. in the Common Pleas.*

Fenner Serjeant moved this Case. An Alien purchaseth Lands in Fee; Alien; Purcha-
sor. The Queen confirms it to the Alien, Office is found, if the confirmation shall bind the Queen; and it seemed to some that it should, for by the Lord Anderson, when an Alien is enfeoffed he receiveth by the Liberty the Fee-simple, of which he shall be seised, until Office be found, and a Precipe quod reddat lyeth against him. Confirmation. And by Fenner an Alien and Denizen Joynt-tenants are disseised, they both shall joyne in Assize, vide 11 H. 4. 26. and by him, the Kings Heiress being an Inheritrix takes a Husband, and have issue, Office is found, the Husband shall be Tenant by the Curtesie, which see 33 E. 3. Traverse 36. It was argued of the other side, that the estate of the Alien is so feeble, that a confirmation cannot enure upon it, for an Alien cannot take but to the use of the King, and cannot be enfeoffed to another use, and if he be, such use is void, for there is not a sufficient seisin in the Alien to carry an use, and it hath been adjudged in the Case of one Forcet, that where an Alien and the said Forcet were Joynt-purchasers, and the Alien dyed, Forcet had not the whole by the Survivor, but that upon an Office found, the Queen should have the moiety: See Dyer 11 Eliz. 288.

Mich.

Mich. 28. and 29. Eliz. in the Common Pleas.

LXII. *sir Roger Lewknor and Fords case.*

Sir Roger Lewknor seized of the Mannor of Wallingford, leased the same to SA for years, and dyed, after which it was Enacted by Parliament, That the said Mannor should from henceforth be deemed and reputed in the Heirs of the body of the said Sir Roger, begotten upon Elizabeth his Wife, the said Sir Roger having three Daughters only, without any other issue: The Daughters married Husbands and had issue: A assigned his interest in the said Mannor to B, C and D, and also to one Shelley; B, C, and D assigned their interest to one Sponer, one of the Defendants, and Shelley assigned his fourth part to Ford another of the Defendants, excepting the Woods and Underwoods. Wast is committed; one of the Daughters having issue dyeth, leaving her Husband, the two surviving Sisters and their Husbands, the Term being expired, brought a Writ of Wast, leaving out the Husband of the third Sister, who was Tenant by the Curtesie, against Shelley and Sponer, who tenuerunt. Shuttleworth Serjeant took Exception to the Writ: scil. predictus Rogerus cujus heredes ipsi sunt, which shall be intended Heirs general, and by the Declaration it appeareth, that the Daughters have to them by Act of Parliament an especial inheritance as Heirs in special tail, and that by a special conveyance: and therefore the Plaintiffs ought to have brought a special Writ, according to their Case, as where Cestuy que use, maketh a lease for years by the Statute of 1 R 3. and the Lessee committeth Wast, now the Feoffers ought to have a special Writ of Wast, according to their Case, as H 8. 6. but that exception was disallowed, and the case cited out of 26 H 8 is upon another reason, for in such case the estate of the Lessee for years is created by the said Statute. Another Exception was taken to the Writ, for the Writ is tenuerunt, which shall be intended prima facie, conjunctim tenuerunt, and in the Declaration it appeareth, that one of the Defendants is assignee of three parts of the Lands demised, and the other Defendant of the fourth part, and so separatim tenuerunt, but that Exception was also disallowed, because originally it was one, and intirely demised interest and estate, and so it remaineth as to the Plaintiffs, although it be divided by the Lessee himself. Another Exception was taken to the Writ, because here it appears upon the Plaintiffs shewing, that Sir Roger Lewknor had three Daughters, and that they have all taken Husbands, and that they have issue, and that one of the said Daughters is dead, leaving her Husband, who is not named in the Writ, for which cause the Writ shall abate: See 22 H 6. 24. 25. But that Exception was also disallowed, for as this Case is, there is not any reason, that the Tenant by the Curtesie should joyn in this Action, for no judgment shall be given here, that the Plaintiffs shall recover the place wasted, for the term is expired, as it appeareth by the words of the Writ, scil. quas tenuerunt, and the Tenant by the curtesie is in possession, and where Tenant by the curtesie and the Heir joyn in an Action of Wast, Tenant for life shall have Locum vacantum, and the Heir the damages, which see 27 H 8. 13. As unto the matter of Law, upon the Exception of Woods and Underwoods, it was argued by Shuttleworth, that the Action of Wast was not well brought against Ford, &c. for the Assignment made by Shelley to Ford was with an exception of all Woods and Underwoods, and therefore Shelley remained Tenant, and he ought to answer for the Wood and the Underwood in the Action of Wast, for upon every demise of Lands the Woods there growing are as well demised as the Land it self, for so it appeareth by the Writ of Wast in dominibus & boscis dimisses ad terminum annorum, &c. which proves, that the Trees are

are parcel of the demise, and so may be excepted: See Dyer 28 H 8. 19. by Shelley and Baldwin. A man leaseth a Mannor, except Woods and Underwoods, the Lessee cuts the Trees, an Action of Wast doth not lie against him for the same, for the thing in which the Wast is supposed to be committed was not demised, &c. and therefore the Lessee shall be punished as a Trespasser and not as Farmer: Fenner Serjeant contrary, and that the Exception of the Woods and Underwoods is meerly void, for Shelley who assigns his interest with the said Exception, hath not any such interest in the Woods and Underwoods, so as he can make such exception, for he had but an ordinary interest in them as Farmer, viz. Houseboot, Hedgeboot, &c. which interest cannot by any means upon an Assignment be reserved to the Assignor, in grosse of the estate, no more than if one hath common appendant to his Land; and he will make a feoffment of the Land, reserving or excepting the common. And he who hath the inheritance of the Land hath an absolute property in the Trees, but the Lessee hath but a qualified interest, and therefore 21 H 6. 46. the Lessor during the term for years may command the trees to be cut down: and 10 H 7. 3. Lessee for years hath not any interest in the trees, but for the loppings, and for the shadow for his Cattel: And in the Case cited, where Lessee for life and he in the Reversion make a Lease for life unto a stranger, and wast is committed, and they bring an Action of Wast, the Lessee for life shall have the place wasted, and he in the Reversion the treble damages, for in him was the true and very property of the Trees, and therefore the treble damages do belong unto him, and not to the Lessee for life, who joyneth with him; and the reason wherefore the Lessee for life or years shall recover treble damages against a stranger who cuts down any trees growing upon the Land to him demised, is not in respect of any property that the Lessee hath in the trees cut down, but because he is chargeable over to his Lessor in an Action of Wast, in which he shall render damages in such proportion. See 27 H 6. Wast. 8. A lease for life is made without impeachment of wast, a stranger of his own wrong cuts down trees, against whom the Lessee brings an Action of Trespass; in such Case he shall not recover treble damages, not for the trees, but only for the breaking of the Close, and the loppings, for he is not chargeable over to his Lessor for the same, because that his Lease was made without impeachment of Wast; and if the Lessee hath such a slender interest in the Trees where his lease is without impeachment of wast, his interest is lesse, where it is an ordinary lease without any such privilege: And the property which the Lessee for years hath in the Trees in such Case, is so appropriated to the possession, that it cannot be severed from it: Windham and Anderson Justices were of opinion, that the Exception above is meerly void: For Ford the Assignee of Shelley is now Tenant and Farmer, who alone can challenge interest in the Trees against all but the Lessor, and Shelley after his Assignment, is meerly a stranger. The interest of the Lessee, and also of his Assignee in the Trees is of necessity, and follows the Farm and the Land as the shadow doth the body; And by him, where Lessee for years by reason of his lease is to have Windfalls, yet he cannot employ them but to the benefit and profit of his Farm, for if he sell them or spend them elsewhere he shall be punished. Rhodes and Periam Justices, that the exception is good as the fruits of the Trees, Shovelers, &c. And afterwards the Case was adjudged upon another point in the pleading, so as the matter in Law did not come to Judgment: See Saunders Case. 41 Eliz. Where Lessee doth assigne, excepting the Timber trees, it is a void Exception.

Pasch. 29. *Eliz.* in the Kings Bench.

LXIII. Gray and Jeffes Case.

Action of as-
sault and Bar-
tery.

In an Action upon the Case by Gray against Jesse, the Plaintiff declared, that where he had placed his Son and Heir apparent with the Defendant, to be his Apprentice, and to learn of him the Art of a Tailor: That the Defendant had so beaten his Son with a Spade, that he thereupon became lame, by reason of which he could not have so much with his Son in marriage of him as otherwise he might have, because the same lameness is a disparagement to his said son: And further shewed, that he himself might spend twenty pounds per annum in Lands. Haulton argued for the Plaintiff. The Action, Quare filium & heredem cepit & abduxit, is given to the Father in consideration that the marriage of his Son and Heir doth appertain to him by the Law, and here by the Battery the Son is become so lame, that he is not so commendable to a Marriage as before; and if the Father had lost the whole marriage, then the Father should have had the Action Quare filium & heredem, &c. but here he hath not lost the whole marriage, but the marriage is lessened by it, and therefore he shall have this Action. Tanfield contrary; I confesse, that the Father ought to have the marriage of his Son and Heir so long as he is sub potestate patris; but here the Father hath committed all his interest, power and authority in his Son to the Defendant his Master, with whom he hath bound his Son Apprentice for seven years, during which term the Father hath not any thing to do with his Son or his Marriage. Wray: the Action, Quare filium & heredem, &c. is not given to the Father, because his marriage belongs to him, but because of the Education; and such was the opinion of Clench Justice, and the marriage doth not belong properly to the Father: For if the Son marieth himself without the leave of the Father there is not any remedy for the Father. And afterwards Judgement was given against the Plaintiff.

Pasch. 29. *Eliz.* In the Common Pleas.

LXIV. Bullers Case.

Replevin.

Edmond Buller brought a Replevin against two, who make Conusans as Baylies to A for rent arrear reserved upon a lease for life, To which the Plaintiff in Barre of the Conusans pleaded, that two strangers had right of Entry in the place where, &c. and that the said two Defendants by their Commandment entred, &c. and took the Cattel of which the Replevin is brought, damage feants, absque hoc, that they took them as Baylies to the said A, and upon that Traverse the Defendants did demurre in Law, Shuckeworth Serjeant; the Traverse is not good, for by that means the intent of the party shall be put in issue, which no Jury can try, but only in Case of Recaption. See 7 H. 4. 101. by Gascoign. If the Bayly upon the distresse shew the cause and reason of it, he cannot afterwards vary from it, but the other party may try him by Traverse; but if he distrain generally without shewing cause, then he is at large to shew what cause he will, and the other party shall answer to it. And it was said by the Court, that when a Bayly distrains he ought, if he be required, shew the cause of his distresse, but if he be not required, then he is not tied to do it. Anderson. We were all agreed in the Case betwixt Lowin and Hordin, that the Traverse, as it is here, was well taken. The Number Rollof that Case is M. 28 and 29 *Eliz.* 2494.

Pasch.

Pasch. 29. Eliz. in the Kings Bench.

LXV. Hudson and Leighs Case.

Hudson recovered against Leigh in an Action of Battery, for which a Capias pro fine issued against Leigh; and also a Capias ad Satisfaciendum, returnable the same Term at one and the same Return: As to the Capias pro fine the Sheriff returned Capi, and as to the Capias ad Satisfaciendum, non est inventus: And for this contrariety of the Return, the Court was of opinion, that the Sheriff should be amerced; but it was moved by the Counsel of the Sheriff, that the awarding of the Capias pro fine was merely void, for the fine is pardoned by the Parliament, And it is also Enacted, That all procelle awarded upon such fines shall be void, and then the Capias pro fine being void, it matters not how or in what manner it be returned, for the Court shall not respect such procelle, nor any return of it, and then the Court not having respect to that Return, there is not any contrariety, for the Capias ad Satisfaciendum only is returned, and not the Capias pro fine. And at another day it was moved again; the Battery was supposed, 1 Junii 1586. and Judgement given the thirteenth of February the same year, upon which issued Capias pro fine, and before the Return thereof the Parliament ended, which pardoned such fines, and made all procelle thereupon void: And it was said by the Court, that if the Sheriff in such Case takes the party by a Capias pro fine, now upon that taking he is in Execution for the party, and if the Sheriff let him go at large, he shall answer for the escape: And in that case the Capias pro fine was well awarded, and the Court ought to regard it, and the Defendant lawfully taken by virtue of it, and also in execution for the party in Judgement of Law, and afterwards when the Parliament came and Enacted ut supra, although the procelle be made void thereby, the same ought to be meant as to the interest of the King in the fine, and the veneration of the Subject by it, but not as to the Execution of the party, but the Sheriff shall answer for that. And it was also holden by the Court, that if the Plaintiff sueth an Elegit then upon the Capias pro fine executed, the Defendant shall not be adjudged in Execution for the party, for he hath made his Election of another manner of Execution, scil. of the Land, and he shall never resort to an Execution of the body, 13 H 7. 12. And as our case is here there was an Elegit obtained, but it was not on Record, nor any Record made of it, and therefore the election of the Execution remained to the Plaintiff; And as to the point aforesaid, that such procelle shall be void, as to the King only, not as to the party: See now 5 Jac. C 6. part. 79. Sir Edward Phittons Case.

Return of the Sheriff.

Escape.

Execution.

Pasch. 29. Eliz. In the common Pleas.

LXVI. Potter and Stedals Case.

In Trespasse by Samuel Potter against Stedal the Case was, Tenant for life of Land leased parcel thereof to hold at will, and being in possession of the residue, leysed a fine of the whole, the Lessee entered into the Land which was let at will in point of feoffment, in the name of the whole; it was holden the same is a good entry for the whole: But if the Disseisor lease for years part of the Land, whereof the disseisin was committed, and the disseisor afterwards entered into the Land which continueth in the possession of the Disseisor in the name of the whole, the same Entry shall not extend to the Land leased, for here the Lessee is in by title, but in the other Case not, for when Tenant for life lease for it at will, and afterwards leysed a fine, the same is a determination

Trespasse.

Entry.

tion of the Will. 16 Eliz. Dyer 377. 1. In the same plea it is as holden, that if there be lessee for life, the remainder for life, the remainder in fee, &c. see for life in possession leaveth a Fine Sur Conusans de droit, &c. to his own use, upon that Fine a Fee-simple accrues.

Pasch. 29. Eliz. in the Common Pleas.

LXVII. Leigh and Hammers Case.

Debt upon a
Recognizance

Thomas Leigh Esquire brought an Action of Debt upon a Recognizance in the nature of a Statute Staple against John Hammer Esquire, before the Mayor and Aldermen of London, in Camera Guild-hall Civitatis predict. and demanded one thousand five hundred pounds, upon such Recognizance acknowledged 20 November, 20 Eliz. and upon default of the said Hammer, according to the custom of London used in course of Attachment, attached six hundred pounds in the hands of one W. Bolton of Grays-Inne, in part of satisfaction of the said debt of one thousand five hundred pounds; and now within the year came the said Hammer, & ad discutionandum debitum predict. had a precept of Scire facias against the said Thomas Leigh, and after pleaded, and demanded Writ of the said Recognizance, and had it, & quod ipse restitutionem of the said six hundred pounds, in manibus dict. W. Bolton attachat habere debet: And upon the whole Record the Case was thus: Rowland Leigh Esquire, being seised of certain Mannors and other Lands in the County of Gloucester, had issue Eliz. his Daughter and Heir inheritable to the said Lands, and by Indent. dat. 20 Maii 19 Eliz. granted Custodiam, regulam, gubernationem, educationem, & maritagium dict. Eliz. to the said Tho. Leigh, after which the said Tho. Leigh by Indenture 14 Martii 29 Eliz. granted and assigned the said custody, rule, government, education and marriage, and all his interest therein, and the said Indenture, to Sir John Spencer, after which the said Sir John Spencer and Thomas Leigh, by their Indenture the 26. of August 20. Eliz. granted and assigned to the said John Hammer the said custody, rule, government, education and marriage of the said Eliz. and all their interest in the same, and all the recited Indentures, by which last recited Indenture 29 August, the said John Hammer covenanted with the said Leigh, that Thomas Hammer Son an Heir apparent of the said John Hammer, maritaret & in uxorem duceret dictam Elizabetham ad vel antequam dicta Eliz. & dictus Tho. Hammer perimplerint suas separatas etates 14. annorum, si dicta Eliz. ad id condescendere & agre are veller; and afterwards before the said Tho. Hammer and the said Elizabeth, suas separatas etates 14. annorum perimplevissent, sc. 8. die Sept. 20 Eliz. the said Tho. Hammer took to wife the said Eliz. the said Tho. Hammer then being etatis 13. annorum and no more, and the said Eliz. then being of the age of nine years and no more, and Thomas Hammer aforesaid over-lived, &c. And pleaded further, that the said Tho. Hammer after he attained his full age of fourteen years, and before any agreement or assent by the said Tho. Hammer to the marriage aforesaid betwixt the said Tho. Hammer and the said Eliz. had, at or after, idem Thomas Hammer came to his age of fourteen years, scil. 10. die Sept. Anno 21 Eliz. ad dictum maritagium disagreevit, & maritagium illud renunciavit; and all this matter was pleaded in Barre, as performance of the Covenant contained in the Indenture of desistance made upon the Recognizance, whereupon the Action is brought. And concluded his plea, unde petit iudicium si dictus Tho. Leigh actionem suam predict. &c. Et quod ipse idem Johannes Hammer restitutionem dict. 600 li. sc. ut praefert attachat habere valeat. And all the question here was, if this marriage had by the manner and afterwards renounced as aforesaid, be such a marriage as is intended in the Covenant, so as the said Covenant be satisfied by it.

it. And it was argued before the Mayor, Recorder, and Aldermen of London, in their Guild-Hall by Anger of Grays-Inne, on the part of Leigh the Plaintiff, and he in his Argument did much rely upon the definition of marriage, by Justinian in his Institutions. *Nuptiæ maris & feminae conjunctio individua continens vitæ societatem*; and the marriage here in question is not according to the said definition, for the persons, parties to this contract, are not persons able by Law to make such contract, because that non attigerunt annos nobiles, Ergo, nuptiæ esse non possunt, but only sponsalia, a step unto marriage; And there is also rendered one reason of the said definition upon the word individua, individua dico, quia non nisi morte aut divortio seperandam, but the marriage now in question might be dissolved without death or divorce, as it is in our case by disagreement: And see Jurisprudentiæ Romanæ, Lib. 1. Cap. 33. *Societas & consortium omni vita inter marem & feminam ad concubitum*; which is *societatis hujus consummatio*: And as every Act doth consist upon three things, 1. Inceptio, 2. Progressio, 3. Continuatio, so is it in the Case of marriage; but in this case when Thomas Hammer took the said Eliz. to wife, that is but an inception, but the progression and consummation of it is cut off by the disagreement, and he much relied upon the words of the Covenant, si dicta Eliz. ad id condescendere & agere vellet, so as there is not any liberty left to the Defendant for the agreement or disagreement of the Son, but he ought to agree at the perill of his father, but if Eliz. will not agree, then the Defendant is not at any mischeif, for in such case the Covenant doth not extend to him, and also here the father is bound that his Son, a stranger to the Obligation should marry the said Elizabeth, which he ought to procure at his perill, or otherwise he shall forfeit his Bond: Egerton Solicitor of the Queen argued to the contrary; This marriage as much as concerns this Covenant, is to be considered according to the reason of the common Law, and not according to the rules and grounds of the Canon or Civil Law, not as a marriage in right, but as a marriage in possession, and marriage in possession is sufficient alwayes in personal things and causes, especially where the possession of the wife is in question, but where the possession of the Husband is in question, there marriage in right ought to be, and where marriage in possession falls in agreement, there it shall not be tried by the Bishop, as in the Case of a marriage of right, where, never accomplished in loyal matrimony is pleaded, but by the Country, for in case of wife in possession, never accomplished in matrimony, is no Plea, but not his wife, which see 12 E. 3. br. 481. A brought an Action of Trespasse against B, and C. B. pleaded, that C is wife of the Plaintiff, and demanded Judgement of the Wit, the Plaintiff by Replication said, never accounted in Lawfull matrimony, but it was not allowed, but was given to say, not his wife, for if C was the wife of the Plaintiff in possession or by Reputation, it is sufficient to abate the Wit: see also 49. E. 3. 18. by Belknap, the right of the Spousall is alwayes to be tried by the Bishop, but the possession of the marriage, not as in Assize by A and K his wife, the Tenant demanded Judgement of the Wit upon speciall matter, and concluded, so is the said K our wife, and not the wife of A, so in a cui in via by B and C his wife, the Tenant pleaded, never accounted in loyal matrimony, the same is no answer to the wife, for she demanded in her own right, and if he who aliened was her Husband in possession, the wife could not have other Action, for Assize doth not lye, because he was her Husband in fact at the said time in possession: And see also 50. E. 3. 20. adjudged according to the opinion of Belknap: And see also 39. E. 3. As to the marriage in right, as the case in question is, for upon such marriage, if the Husband be murdered before disagreement, the wife shall have an Appeal of Murder, and a Wit of Deliver: see where Appeal is brought of the Rape of his wife, although she be his wife but in possession, and not in right, 11. H. 4. 13. by Halls 168. and by Littleton, if the wife be of the age, but of nine years, shee shall

shall have Dower, which see also 35. H. 6. and yet Dower shal never accrue but in case of marriage in right, for there never counted in marriage, is a good Plea, vi. 12. R. 2. Dower 54. In Dower the Tenant pleaded, that the Husband at the time of his death was but at the age of ten yeares, and the Defendant now but of eleven yeares, and yet Judgement was given for the Defendant, for by Charleton the same was a marriage in right untill disagreement, see 22. Eliz. Dyer 369. A woman in full age marryeth a Husband of twelve yeares, who dyeth before the age of consent, the same is a good marriage, and so ought to be certified by the Bishop, and 7. H. 6. 117. by Newton, a woman married within age of consent may post an Action as a feme sole, and the writ shal abate, Stamford Prerogat. 27. 19. E. 3. Judgement 123. In a writ of Ward, the Jury found, that the Infant was of the age of ten yeares, and no more, but they did not know whether shee were married or not, but de bene esse, if he be married, assess damages one hundred pounds, and if not, five pounds upon which it appeareth that marriage at such an age is such a marriage upon which the Lord shal recover damages; See 13. H. 3. gard. 148. such marriage in the life of the Ancestour, infra annos nobiles, if there be no disagreement shall bind the King: And after the death of the Ancestour, the heire shal remain in custodia Domini Regis, usq; ad aetatem ut consentiat, vel dissentiat, 45. E. 3. 16. In a writ of Ward, the Infant was found of the age of twelve yeares, and the Jurors gave damages three hundred marks, if he were married, and 17. H. 6. gard. 118. & 47. E. 3. Br. Trespasse 420. and Ficz. Action upon the Statute 37. Trespasse, de muliere abducta cum bonis viri, where the Wife is within the age of consent: And if I be bounden unto another in an Obligation, upon condition to pay a sum of money upon the marriage day of I S, now, if I S be married within the age of consent, I am bound to pay the money the same day, although afterwards the parties do dissent, and the Wife of such a marriage shall be received in a Plea reall upon the default of her Husband, & the words, si dicta Eliz. ad id condiscendere & agreeare vellet, are to be understood of an agreement at the time of the marriage, and here the time is limited for the solemnization of the marriage, scil. at or before they shall have accomplished their severall ages of twenty one yeares, makes the matter clear; For it is in the election of Hammer the father, to procure this marriage, scil. that his Son shall take to Wife, the said Elizabeth, at which of the two times he will, scil. at or before, &c. to the marriage before, &c. is as effectual in respect of the performance of this condition, as if the marriage had been had after, and as the case is, the condition could not be better performed, for if the marriage had been stayed till after fourteen yeares, &c. although the marriage doth not ensue, yet the Obligation had been forfeited, and that the marriage be solemnized just at the age of both of fourteen yeares, was impossible, for Thomas Hammer was the elder by two yeares, then the said Elizabeth, and therefore they ought to be married at such time which might stand with the condition, and the same is done accordingly: And as to that which hath been objected, That now by disagreement the marriage is determined, we ought to observe that Hammer was bounden for the performance of the Covenant, and that his son and heir apparent maritaret, & in uxorem duceret dictam Eliz ad vel ante, &c. which is executed accordingly, and he is not bounden for the continuance of the said marriage, but the continuance of the same ought to be left to the law, which giveth to the parties libertie to continue the marriage by agreement, or to dissolve it by disagreement; And therefore if I be bounden to you, that I S (who in truth is an Infant) shall levy a fine before such a day, which is done accordingly, and afterwards the same is reversed by Error, yet notwithstanding the condition is performed, &c. And afterwards Judgement was given against the Plaintiff.

Pasch. 29. Eliz. in the Common Pleas.

LXVIII. The Earl of Warwick and the Lord Barkleys Case.

Ambrose Earl of Warwick and Robert Earl of Leicester brought a Writ of Partition against the Lord Barkley, in which the parties pleaded to issue. And now at the day of the Enquest the Defendant did challenge, that in the whole Pannel there were but two Hundreders, and at the first it was doubted by the Court, if upon the Statute of 27 Eliz. cap. 6. by which it is Enacted, That no further challenge for the hundred shall be admitted if two sufficient Hundreders do appear, the Enquest shall be taken: But at length the whole Court was clear of opinion, that the said Statute did extend but to personal Actions; but this Action of Partition is a real Action; and summons, and severance lieth in it, but not proceſſe of out-latorry, and therefore here four Hundreders ought to be returned; so in an Action of Waste, although it be in the personalty: and therefore the Council of the Plaintiffs prayed a Tales.

Pasch. 29. Eliz. in the Common Pleas.

LXIX. The Archbishop of York and Mortons Case.

The Archbishop of York recovered in an Assize of Novel disseisin against one Morton before the Justices of Assize; upon which Judgement Morton brought a Writ of Error before the Justices of the Common Pleas, and after many motions at the barre, it was adjudged that a Writ of Error upon the said Judgement did not lie in the said Court. 18 Eliz. Dyer 250. F B 22. That upon Erronious Judgement given in the Kings Bench in Ireland, Error shall be brought in the Kings Bench in England, 15 E 3. Error 72. Fenner who was of Council with the Archbishop demanded of the Court how, and in what manner the Record shall be remanded to the Justices of Assize, so as the ArchBishop might have execution; To which the Court said, that the surest way is to have a certiorare out of the Chancery into the Common Pleas directed to the Judges there; and then out of the Chancery by Pittimus to the Justices of Assize. But Fenner made a difficulty of it to take such course for the remanding of it, for doubt they would not allow it to be a Record where it is not a Record, for upon the matter the Record is not removed, but remains with the Justices of Assize. Then Anderson said, Due Execution out of the said Record; but because the Record came before us by Writ of Error, it shall be also removed and remanded by Writ: and so it was.

Pasch. 29. Eliz. In the Common Pleas.

LXX. Kempe and Carters Case.

Thomas Kempe brought Trespasse for breaking of his Close against Carter: and upon pleading they were at issue, if the Lord of the Mannor asforesaid granted the said Lands per copiam rotulorum curie manerii predicti. secundum consuetudinem manerii predicti. and it was given in Evidence, that within the said Mannor were divers customary Lands, and that the Lord now of late at his Court of the said Mannor granted the Land, &c. per copiam rotulorum

Evidence of
customs,

tulorum curiz, where it was never granted by copy befoze: It was now holden by the whole Court, that the Jury are bound to find, Dominus non concessit, for notwithstanding that de facto Dominus concessit per copiam rotulorum curiz, yet, non concessit secundum consuetudinem manerii predicti. for the said Land was not customary, nor was it demiseable, for the custome had not taken hold of it. In the same Case it was also shewed, that within the said Pannoz some customary Lands are demiseable for life only, and some in Fee; And it was said to that by the Lord Anderson, that he who will give in Evidence these several customs, ought to shew the several limits in which the several customs are severally running, as that the Pannoz extends into two towns, and that the Lands in one of the said Towns are grantable for lives only, and the Lands in the other in Fee; and he ought not to shew the several customs promiscue valere through the whole Pannoz: And he remembred a Case of his own experience: scil. The Pannoz of Wadhurst in the County of Sussex consisted of two sorts of Copy hold, scil. Book-land and Bond-land, and by several customs disseverable in several manners: as if a man be first admitted to Book-land, and afterwards to Bond-land, and dyeth seised of both, his Heir shall inherit both; but if he be first admitted to Bond-land, & afterward to Book-land, and of them dyeth seised, his youngest Son shall inherit, and if of both simul & semel, his eldest Son shall inherit; But if he dyeth seised of Bond-land only, it shall descend to the youngest; and if customary Land hath been of ancient time grantable in Fee, and now of late time for the space of forty yeares hath granted the same for life only, yet the Lord may if he please resort to his ancient custom and grant it in fee. It was also moved in this case, If customary Land within a Pannoz hath been grantable in Fee, if now the same Escheat to the Lord, and he grant the same to another for life; the same was holden a good grant, and warrantable by the custom, and should bind the Lord, for the custom which enables him to grant in Fee shall enable him to grant for life; and after the death of the Tenant for life, the Lord may grant the same again in fee, for the grant for life was not any interruption of the custom, &c. which was granted by the whole Court.

Pasch. 29. Eliz. in the Common Pleas.

LXXI. Walker and Nevils Case.

Dower.

Damages.

Walker and his Wife brought a Writ of Dower against Service Nevil, and judgement was given upon Nihil dicit, and because the first Husband of the Wife dyed seised, a Writ of Enquiry of Damages was awarded, by which it was found, that the Land which she ought to have in Dower, the third part was of the value of eight pounds per annum, and that eight yeares elapsent a die mortis viri sui proxime ante inquisitionem & assellant damna to eight pounds, and it appeared upon the Record, that after Judgment in the Writ of Dower aforesaid the Demandants had execution upon habere facias sefinam, so as it appeareth upon the whole Record put together, that damages are assessed for eight yeares, where the Demandants have been seised for part of the said eight yeares, upon which the Tenant brought a Writ of Error, and assigned for Error, because damages are assessed untill the time of the Inquisition, where they ought to be, but to the time of the Judgement; but the Exception was not allowed; Another Error was assigned, because that where it is found, that the Land was of the value of eight pounds per annum, they have assessed damages for eight yeares, to eighty pounds, beyond the Revenue; for according to the rate and value found by verdict it did amount but to sixty four pounds; but that Error was not also allowed; for it may be, that by the long detaining of the Dower, the Demandants have sustained more damages then the

bare

bare Revenue, &c. Another Error was assigned, because Damages are assessed for the whole eight yeares after the death of the Husband, where it appeareth, that for part of the said yeares, the Demandants were seised of the Lands by force of the Judgement and execution in the Writ of Dower, and upon that matter the writ of Error was allowed.

Pasch. 29. Eliz. in the Common Pleas.

LXXII. Archpoole against the Inhabitants of Everingham.

IN an Action upon the Statute of Winchester of Hue and Cry by Archpoole against the Inhabitants of the Hundred of Everingham, the Jury found, that the Plaintiff was robbed 2 Januarii post occasum solis, sed per lucem diurnam, and that after the Robbery committed, the Plaintiff went to the Town of Andover, and advertised the Baylies of the said Town of the said Robbery; and further found, that the said Town of Andover is not within the said Hundred of Everingham, and that there is another Town nearer to the place where, &c. the Robbery was done, then the said Town of Andover within the said Hundred, but the said Town of Andover was the nearest place where, &c. by the Kings high-way: It was moved that upon this matter, that the Plaintiff should not have judgement, for that he hath not made his fresh sute according to the Law, for he ought to have begun his fresh sute within the Hundred where the Robbery was done: and it was also objected, that the Robbery was done post occasum solis, in which Case the Hundreders are not to pursue the Malefactors. And Walmsey Serjeant cited a Case out of Bracton: Si appellatus se defenderit contra appellantem tota die usque ad horam in qua Stellæ incipiunt apparere, recedat quietus de appello, and it is not reason to oblige the Hundreders to follow felons at such a time, when for want of light they cannot see them. And all the Justices were clear of opinion, that if the Robbery was done in the night time, the Inhabitants are not bound to make the pursuit: And by Rhodes, if in a Præcipe quod reddat of Lands, the Sheriff summons the Demandant upon the Land in the time of night, such a summons is merely void.

Pasch. 29. Eliz. in the Common Pleas Intrat. Trin. 28. Rot. 1458.

LXXIII. Wiseman and Wisemans Case.

IN an Action of Debt by Wiseman against Wiseman, the Case was, that one Wiseman was seised of the Lands, and by his Will devised, 1. I will and bequeath unto my Wife B. acre for the Term of her life, the remainder to my Son Thomas in tail: Item I will and bequeath unto my Son Thomas, all my Lands in D, and also my Lands in S, and also my Lands in V. Also I give and bequeath unto the said Thomas my Son all that my Island or Land enclosed with water which I purchased of the Earl of Essex: To have and hold all the said last before devised premises unto the said Thomas my Son, and the Heirs of his body: The only matter was, If the Habendum shall extend to the Island only, in which Case Thomas shall have but for life in the Lands in D, S, and V, or unto the Island, and also to the Lands in D, S, and V; in which Case he shall have fee-tail in the whole. And it was argued by Fenner, that the Habendum should extend to the Island only; as he said, the opinion of the Justices of this Court was in 4. Eliz. in another Case. I devise my Mannor to D my eldest Son, and also my Land in S in tail, in that Case the entail limited for the Land in S shall not extend to the

Debt.

Devises:

into Danno, and of such opinion was Weston, Welch, and Dyer; Brown con-
tra, that the Son hath in tayl in both. But if the words of the devise had been,
I devise my Danno, of D and my Lands in S to my Son in tayl, here the Son
has in estate tayl in both. So it hath been adjudged, that if I devise Lands
to A, B, and C, successively as they be named, the same is good by way of Re-
mainder: Walmsley contrary, and he relied much upon this, that the words
of the Habendum are in the plural number. All the last before devised pre-
misses, whereas the thing lately devised by the Will was an Island in the sin-
gular number, which cannot satisfy the Habendum, which is in the plural num-
ber, and therefore to verify the plural number in the Habendum, the Haben-
dum by fit construction shall extend to all the Lands in D, S, and V: and so
upon his motion made at another day, it was resolved by all the Justices, that
the Habendum should extend to all the said Lands, and the Habendum should
not streighten the Devise to the Island only.

Extent of an
Habendum.

Pasch. 29. Eliz. in the Common Pleas.

LXXIV. Fullwood and Fullwoods Case.

Bail renders
himself in
court.

In an Action upon the Case, the Defendant put in bail to the Court to an-
swer to the Action; and now Judgement being given against him, he came
into Court and rendered himself, and prayed, that in discharge of his sureties,
that the Court would record the rendering of himself, which was granted: And
the Court demanded of the Plaintiff, if he would pray execution for the body
against the Defendant, who said, he would not, whereupon the Court awarded,
that the sureties should be discharged; and the Rule was entered, that the De-
fendant offered himself in discharge of his sureties, and *Attornatus Querentis*
allocutus per curiam, &c. dixit se nolle, &c. Ideo consideratum fuit per curiam,
quod tam prædict. defend. quam prædict. Manu captos de recognitione præ-
dict. & denariis in eadem contentis exoneretur.

LXXV. Pasch. 29. Eliz. in the Common Pleas.

Feoffments.

Attornment.

The Case was, He in the Reversion upon a Lease for yeares, makes a Char-
ter of feoffment to divers persons to the use of himself for life, and as-
ter to the use of his eldest Son in tayl; and the words of the Charter were,
Dedi, concessi, Barganizavi, & feoffavi, and he sealed and delivered the deed, but
no livery of seisin was made; and afterwards he came to his Lessee for yeares,
and said to him, that he had made a feoffment, and shewed also the uses, but
did not shew to whom the feoffment was made, to whom the Lessee said, you
have done very well, I am glad of it: And if that were a good Attornment
was the Question: It was said, that that was the Case of one Arden. And
Gent, and Manwood were of opinion, that the same was no Attornment, be-
cause it was not made to the feoffees, scil. to the Grantor of the Reversion;
and so it was ruled in this Case, for Attornment ought to be to the Grantor
himself, and not to Cestuy que use.

Pasch. 29. Eliz. in the Common Pleas.

LXXVI. The Parson of Facknams Case.

Tythes, and
where the spi-
ritual court
shall have ju-
risdiction of
them.

The Parson of great Facknam brought an Action of Trespasse against the
Parson of Hannington, and the Case was, If the Parson of one Parish
claim by prescription a portion of Tythes out of the Parish of another, if
the

the Spiritual Court shall have the Jurisdiction, for the tryal of it: And the opinion of the whole Court was clear, that it should, because that the matter is betwixt two spiritual persons, and concerning the right of Tythes. As 33. H. 6. 39. I Viccar of B. brought Trespasse for taking away of forty loads of Beanes, &c. The Defendant pleaded, that he is Parson of the said Church of B. and the Plaintiff is Viccar, &c. and before the Trespasse, &c. the Beanes were growing in the same Town, and severed from the nine parts, and he took them as belonging to his said Church, and demanded Judgment of the Court, &c. The Plaintiff said, that he and all his Predecessors Viccars, &c. time out of mind, &c. have used to have the Tythes of such a Close, &c. belonging to his Viccaridge, and within the said Close the Beanes were growing, and were parcel of his endowment; and that at the time of the taking they were severed from the nine parts: whereupon he took them. And it was holden by Ashton and Danby, because it is confessed on both sides that the Beanes whereof, &c. were Tythes, the Right of which would come in debate betwixt the Parson and the Viccar, and both are spiritual persons, that the tryal thereof doth belong to the Spiritual Court. See 6 E. 4. 3. 12 E. 4. 23. 24. in such a matter betwixt Parson and Viccar there the Tempozal Court was ousted of the Jurisdiction. See also 31 H. 6. 11. betwixt the Parson and the Servant of another Parson. 7 H. 4. 102. In Trespasse by a Parson against a Layman, who said, that one A is Parson of a Church in a Town adjoining to a Town where the Plaintiff is Parson, and that A let to him the Tythe, and demanded Judgment, &c. and pleaded to the Jurisdiction, and by Gascoigne, the Plaintiff may recover his Tythes in the Spiritual Court.

Passch. 29. Eliz. in the Kings Bench.

LXXXV. II. Bunny against Wright and Stafford.

In Trespasse the Case was this: Grindal Bishop of London leased parcel of the possessions of his Bishoprick for one and twenty years, and afterwards ousted the Lessee and leased unto another for three lives, rendering the ancient and accustomed Rent, which was confirmed by the Dean and Chapter. And afterwards Grindal is translated: Cook argued, That the Lease is warranted by the Statute of 1 Eliz. At the Common Law a Bishop might make an Alienation in free-simple being confirmed by the Dean and Chapter: But by 32 H. 8. cap. 28. Bishops without Dean and Chapter, or their confirmation may make a Lease for one and twenty years, but with the confirmation of the Dean and Chapter may make a Lease for one thousand years. But by the Statute of 1 Eliz. the power of Bishops in that right is much abridged, for now with confirmation or without confirmation they cannot dispose of their possessions but for one and twenty years or three lives; and this Lease is in all points according to the Statute of 1 Eliz. for first it begins presently upon the making of it: Secondly, the ancient rent is reserved payable yearly during the term, for although here be an old Lease in esse, yet the Rent reserved upon the second Lease is payable during the second term, for payable is a word of power and not of action, as 1 H. 4. 1. 2. 3. Lord, Helne, and Tenant, the Helne gives the Helnalty in tall, rendering Rent, it is a good Rent, and well reserved, although here be not a present distress; yet it may be the Tenancy will escheat, and then the Donor shall distress for all the Arrearages: And so the Rent is payable by possibility. And 10 E. 4. 4. A leaseth for years, and afterwards grants the Reversion to a stranger, if the Heirs of the stranger come upon the Lands during the term; A may distress for the Arrearages incurred, and if he happen seisin, he shall have an

Leases within
1 Eliz. and
32. 7. 8. made
by Bishopst

Adize during the continuance of the first term. And he cited a Case lately adjudged in the Exchequer. Lessor entered upon Lessee for years, and made a feoffment renazing Rent with clause of Re-entry, the Lessee re-entered, claiming his Term, and afterwards during the said Term for years, the Rent reserved upon the feoffment upon demand of it is behind: Now hath the Lessor regained the Reversion: And so a Rent may be demanded although not distrainable. And all that was affirmed by Egerton Sollicitor General: And see the words of the Statute of 32 H 8. cap. 28. Rent reserved yearly during the said Lease due and payable to the Lessor, &c. such Rent, &c. and yet by the said Statute, such Leases may be good, although there be a former interest for years in being, if the same shall be expired, surrendered, or ended within one year after the making of such new lease, and so not expressly payable in, rei veritate, annually during the Term.

Pasch. 29. Eliz. in the Kings Bench.

LXXVIII. Bonefant and Sir Rich. Greenfeilds Case.

Sale of Lands
by the Execu-
tors of the
Devil:or

Bonefant brought Trespasse against Sir Rich. Greenfeild, and upon the general issue, this special matter was found: Tremagrie was seised of a Manor, whereof the place where, &c. was parcel, in his Demesne as of Fee, and by his Will devised the same to his four Executors, and further willed, that his said Executors should sell the same to Sir John Saintleger for the payment of his debts, if the said Sir John would pay for it one thousand one hundred pounds at such a day, and dyed, Sir John did not pay the money at the day. One of the Executors refused Administration of the Will, the other three entered into the Land and sold it to the Defendant for so much as it could be sold, and in convenient time. It was moved, that the sale was not good, for they have not their authority as Executors, but as Devisees, and then when one refuseth, the other cannot sell by 21 H 3. Cestuy que use, Wills, that his Executors shall alien his Land, and dyeth, although the Executors refuse the Administration, yet they may alien the Land. 19 H 8. 11. 15 H 7. 12. Egerton Sollicitor argued, that the sale is good by the Common Law, and also by the Statute 49 E 3. 16, 17. Devise, that his Executors shall sell his Land, and dyeth, and one of the Executors dyeth, another refuseth, the third may sell well enough, and such sale is good. See Br. Devise 31. 30 H 8. 39 E 3. Br. Adize 356. And he put a difference where an Authority is given to many by one deed, there all ought to joyn; contrary, where the Authority is given by Will; And if all the Executors severally sell the Lands to several persons, such sale which is most beneficial for the Testator shall stand, and take effect: And here it is found by verdict, that one of the Executors, recusavit onus Testamenti, Ergo, he refused to take by the Devise, for it was devised unto him to the intent to sell, therefore if he refuseth to sell, he doth refuse to take, and so it is not necessary that he who refuseth joyn in the sale, and although we are not within the expresse words of the Statute, yet we are within the sense and meaning of it. And afterwards it was adjudged, that the Condition, for the manner of it, was good.

Pasch. 29. Eliz. In the Common Pleas.

LXXIX. Gamock, and Cliffs Case.

Ej: ctione
summa:

Ej: ctione firmæ was brought by Gamock against Cliffe of the Manor of Hockley, in the County of Essex, and upon the evidence the case was:

That the King and Queen, Philip and Mary, seised of the said Mannor of Hockley, leased the same to Edmund Terrell for years, exceptis & Reservat. grossis arboribus super premissis crescentibus & existentibus; Proviso, that if the said Lessee his Executors, or Assignes shall do any voluntary Waste in any of the Premises before demise, that then the said demise shall be void and accounted none in Law, the said King and Queen after that lease grant the Reversion to the Lord Rich & his Heirs, the Lessee cuts down certain great Trees, which at the time of the demise were not great, but little Trees, but after, tractu temporis, became great, at the time of the cutting down were great, upon whom the Lady Rich wife & Widow of the said Lord Rich, being Tenant in Dower, the said Mannor (inter alia) being assigned to her in Dower, did enter, for the condition broken: It was moved, If the exception did extend to the trees which at the time of the demise were but little trees, but afterwards at the time of the cutting of them down were become great; for if the exception do extend to such Trees, then upon the matter they were not demise, and if so, then waste can not be assigned in the cutting down of them, and then by the cutting of them, the condition is not broken: But if the exception shall be construed to extend to such Trees only which were great, Tempore dimissionis, then those Trees in which, &c. are demise, and by the cutting down of them, the condition is broken. And the Lord Anderson was of opinion, that the exception did extend to Trees, which at any time, dimissionis predict. became great, although at the time of the demise they were but little, so as upon the matter, such Trees were never demise, and so the condition doth not extend to them; otherwise it should be if the words had been modo crescentibus & existentibus: Another matter was moved, because if the Lady Rich, being Tenant in Dower, and so in by the Law, not by the party, and so not privy, nor as Assignee could enter for the condition broken: And the Court was clear of opinion, that because, that the words of the condition are, Quando dimissio predict. erit vacua, &c. and no clause of re-entry is referred, so that privy is not requisite, the Lady Rich, shall take advantage of the condition, 11 H. 17. Where the words of a Lease are, that upon the not going to Rome, that the Lease shall cease, it was holden that the Grantee of the Reversion by the common Law should take advantage of such a condition, contrary where the condition is conceived in words of re-entry, 21 H. 7. 12. It was moved further, that here is not any voluntary waste in the Lessee as to the condition, because done by a stranger, and not by the Lessee himselfe, and so that the condition is not broken, only the Lessee is subject unto an Action of Waste, otherwise, if the Lessee had expressly commanded the Tenant to cut them down, or had given to him expresse authority: The sale was, All his Woods growing, &c.

Where the
Tenant in
Dower shall
take advantage
of a condition.

Pasch. 29. Eliz. In the common Pleas.

LXXX. Gill and Harewoods Case.

Gill brought an Action upon the Case against Harewood, and declared, that Assumpsit. Where the Defendant was indebted to the Plaintiff in such a sum, and shewed how; the Defendant in consideration that the Plaintiff, per parum tempus deferret diem solutionis, &c. did promise to pay, &c. And, upon Non Assumpsit pleaded, it was found for the Plaintiff, and it was moved in arrest of Judgement, that here is not any consideration, for no time is limited for the forbearance, but generally, parum tempus, which cannot be any commodity to the Defendant, for the same may be, but punctum temporis, &c. But the exception was not allowed, for the Debt in it selfe is a sufficient consideration.

Pasch.

LXXXI. Pasch. 29. Eliz. In the common Pleas,

Fenner Serjeant would have drawn a Fine which was by Dedimus Potestatem, and the Fine was to two; and their heires, but the Court would not receive such Fine for the incertainty of the Inheritance, which always in case of Fine ought to be reposed in a person certain, and not left to uncertainty of the Survivor; the said Serjeant prayed presently, that the said Fine be received at the perill of the Conuees, but the same was denyed him by the whole Court.

Mich. 29. and 30. Eliz. In Communi Banco.

LXXXII. Mascalls Case.

Covenant.

Mascall leased a House to A for yeares by Adventure; by which A covenanted with Mascall to repaire the House Leased, and that it should be lawfull for Mascall his heires and Assignes to enter into the House to see in what plight for matter of Reparation the said House stood, and if upon any such view, any default should be found in the not repairing of it, and thereof warning be given to A, his Executors, &c. Then within four moneths after such warning, such default should be amended: the House in the default of the Lessee became ruinous: Mascall granted the Reversion over in Fee to one Carre, who upon view of the House gave warning to A of the default, &c. which is not repayed, upon which Carre, as Assignee of Mascall, brought an Action of Covenant against A. It was moved by Fenner Serjeant, that the Action did not lye, because, the House became ruinous before his interest in the Reversion; But the opinion of the whole Court was against him, for that the Action is not conceived upon the ruinous state of the House, or for the committing of Waste, but for the not repaying of it within the time appointed by the Covenant, after the warning, so as it is not materiall within what time the House became ruinous, but within what time the warning was given, and the default of the Reparation did happen.

LXXXIII. Mich. 29. & 30. Eliz. In Communi Banco.

Dower.

Is a Writ of Dower, brought by a Woman of the third part of certaine Lands, &c. The Tenant pleaded; That the Lands of which Dower is demanded, are of the nature of Gavel-kind, and that the custome of such Land is, that Dower ought to be demanded of the moiety of it, and not of the third part, upon which the Demandant did demur: And the opinion of Windham and Anderson Justice was; That such a Woman of such Land might at her pleasure demand her Dower either according to the Custome, or according to the common Law; for by Anderson, the common Law was before the Custome, quod quare, and by Windham, if the Demandant here recouer her Dower according to the common Law, yet if shee taketh another Husband, shee shall lose her Dower as if shee had been endowed according to the Custome, Coke, an Apprentice of the Inner Temple being at the Bar, when this Case was moved, said unto Serjeant Shuttleworth, that the Case had been adjudged against the Demandant, and Scot Preignothory did affirme, that the Lord Dyer was of opinion, that the Woman ought to be endowed according to the Custome, and not otherwise, And Sayer one of the Clerks of Nelson, theise

cheife Designothoyz said, that it was adjudged accordingly, 16. Eliz. and that the Case was betwixt Gelbrand Demandant, and Hunt Tenant.

Mich. 29. Eliz. in the Common Pleas.

LXXXIV. *Beverlie and Cornwall Case.*

Beverlie brought a Quare Impedit against Cornwall, and had Judgement to recover upon a Demurrer in Law: which see Mich. 28. and 29. Eliz. And now the Queen brought a Scire facias upon the matter. That the said Beverly after the said Judgement was out-lawed in an Action of Trespasse at the suite of I S, and upon that a Scire facias issued, ad respondendum Quare di-
Our-lawry pleaded.
 ca Domina Regina, should not have execution of the Judgement aforesaid, by reason of the Out-lawry aforesaid; and declares in all as aforesaid: And further, that the said Cornwall had resigned. Upon which Beverly did demur in Law. And this Term it was argued by Puckering Serjeant for the Queen, that by that Out-lawry the Interest to present is transferred to the Queen. Which see 5 H 3. Tenant at will of a Pannoz, to which an Abbotsen is appendant is out-lawed in an Action of Trespasse; the Church voided; by award of the Court it belongs to the King to present: And see 8 R 2 scil. Quare Imped. 200. A seised of an Abbotsen, the Church becomes void. A is out-lawed in a personal Action; the King shall have a Quare Impedit in that Case. And as to the Exception taken, because the Out-lawry is not sufficiently layed in the Writ, but only generally, viz. ut lagatus in Com. Lincoln, ad sectan. JS in plito transgressionis, without shewing the Out-lawry at large, there is a difference, where an Out-lawry is pleaded by way of barre, and disability of the person, &c. and where it is set down in a Writ, for a Writ ought shortly and compendiously to comprehend the cause of the Action, especially judicial Writs which are not tyed to any form certain, especially because that the Out-lawry set forth in the Writ is a Record of the same Court: for the perclose of the Scire facias is, pro ut per recordam hic in curia plenius apparet: And that Record being in the Court, the party cannot plead, Nul tiel record, as if the Record had been in any other Court: But he ought to demand Oyer of of the Record: Which vide 5 H 7. 24. Walmesley Serjeant contrary. By Out-lawry in an Action personal, the King cannot seise Land, but only take the profits of it, 9 H 6. 20. 21 H 7. 7. And as our case is, nothing both accret to the Queen by this Out-lawry, for the Queen her self is seised of the Abbotsen, because she, usurpando presentavit, and her Clark admitted; and although Beverly hath recovered in a Quare Impedit against the Presentee of the Queen; yet because he is not removed by a Writ to the Bishop, the Queen continues Patron, and nothing remains in Beverly that may be forfeited; But Rhodes and Periam contrary, for by Periam if after such Recovery the Incumbent dyeth, the Patron shall present, for by the Judgement in the Quare Impedit for Beverly, the Patronage is rebeised in him without any other execution: And by Rhodes, if after such Judgement the Patron dyeth, his Executors shall have a Writ to the Bishop. And by Walmesley, the Scire facias doth not lie for the Queen; for that Writ alwayes runs in privy of the Record upon which it is grounded, to which Record the Queen is a Stranger, and by Out-lawry in an Action personal no Action real shall escheat, and therefore this Scire facias being in the nature of a Quare Impedit upon which it is grounded, which is a real Action, or at least a mixt shall not be forfeited; and also it shall be absurd to grant now a Writ to the Bishop for the Queen; whereas Judgement was given against the Queen, as in our case it hath been. And in no Case the Judges shall respect the title of the Queen, being a Stranger to the Writ: But where a title for the Queen doth appear upon

upon the pleading, or otherwise within the Record, 11 H 4. 224. by Hankford. If a clear title for the King be confessed by the parties upon pleading, a Writ to the Bishop shall issue for the King; so if such matter appear in Evidence, &c. the Land in question is seisable into the Kings hands. See 9 H 7. 9. 16 H 7. 12. so 21 E 4. 3. by Choke and F N B 38. e. In a Quare Impedit betwixt two Strangers if title both appear to the Court for the King, a Writ to the Bishop shall issue forth for the King; but in our Case nothing is within the Record to intitle the Queen, but all the matter upon which a Writ to the Bishop is prayed for the Queen is out of the Record, and a foreign thing. And as to the Dut. law, he conceived it is not sufficiently alledged; for he ought to have made mention of the Origent and of all the proceeding upon it, and the Judgment of the Coronors, and for defect of that no title is given to the Queen; and of that opinion was the Lord Anderson, and that it ought to be set forth in the Writ in what Term the said Beverly was out-lawed, and the Pumber Roll also; so that if Beverly had demanded Dyer of the Record, the Court might know it: And by Nelson their Preignothory, the Term in which the Dut. law was, ought to be comprised in the Scire facias. Vide Book Entries 485. where in a Quare Impedit for the Roy upon such a title, the King shewed in his Court, that A was seised of such an Advowson, and granted the next Avoidance to B, and that afterwards one C impleaded the said B in a Writ of Account in such a Court, where Nihil was returned upon the summons, upon which issued forth a Capias, upon which is returned, Non est inventus, &c. upon which an Exigent, upon which the Sheriff did return, quod ad com. tenet. &c. & ad iiii. comitat. tunc prox. precedit. the said B exactos fuit, & non comparuit, & quia ad nullum eorundam comitat. aparuit, ut legatos fuit, and after the Church voided, and that by reason thereof it did belong to the King to present: vide ibid. 196. accordingly. And as to the Scire facias all the Judges agreed, that upon the matter the Writ lay well enough: And it is good discretion in the Court to grant such a Writ: And by Rhodes, If two Coparceners of an Advowson make composition to present by turns, and afterwards one of them dyeth, her Heir within age, and Ward to the King: The Church voideth, and the King is disturbed in his presentment, he shall have a Scire facias upon such composition, notwithstanding that he be a Stranger to it: See F N B 34 H. And by all the Justices, if one recover in Debt upon a simple contract, and before execution the Plaintiff is out-lawed in an Action personal, the King shall sue execution: And see 37 H 6. 26. Where in Debt upon an Obligation it was surmised to the Court, that the Plaintiff was out-lawed: And the Kings Attorney prayed delivery of the Obligation, &c.

Mich. 29 and 30 Eliz. In Communi Banco.

LXXXV. Moile and the Earle of Warwicks Case.

A Quare Impedit was brought by Walter Moile against Ambrose Earl of Warwick, and the Archbishop of Canterbury. And now came the Serjeants of the Queen, and shewed an Office, to entitle the Queen to have a Writ to the Bishop, containing such matter, viz. That one Guilford was seised of the Mannor of D, to which the Advowson of the Church was appendant, and that Mannor was holden in cheife by Knights service, and that Guilford and his Wife leved a Fine thereof to the use of themselves for their lives, the remainder over in tail to their eldest Son, and that Guilford is dead, but who is his next Heir, ignorant: And it was shewed by the Council of the other side, that the truth of the Case was, that the said Guilford was seised of the said Mannor in the right of his Wife, and so leved the Fine, in which Case the said conveyance is not within the

the Statute of 32 H 8. for it was for the advancement of the Husband, not of the Wife, which Anderson granted. Vide Dyer 19 Eliz. 354. Caverlies Case, but that is not in the Office: And it was moved at the Barre, that the Office is imperfect, because no Heir is found. But Anderson, the Office is sufficient for the King to seise, although it be insufficient for the Heir, &c. And it was agreed by the whole Court, Office tro-
ve. that the Court ought not to receive the Office, although one would affirm upon oath, that it is the very Office, but it ought to be brought in under the Great Seal of England; and also the Court shall not receive it without a Writ, and yet Nelson Preignothory said, that the Statute of Hury and Cry of Winchester was brought into the Court without a Writ under the Great Seal, and that was out of the Tower: And in that Case also the Justices held, that if a Record be pleaded in the same Court where it abides, the other party against whom it is pleaded may plead, Nul tiel Record, as if the said Record had been remaining in another Court, which all the Preignothories denied, and that alwayes it had been used to the contrary. At another day the Case was moved again. The Plaintiff in the Quare Impedit counted, that Richard Guilford was seised of the said Mannor, &c. in the right of Bennet his Wife, and so seised, they both leved a fine thereof to a stranger, Sur Conusans de droit come ceo, who rendred it to the Husband and Wife for their lives, the remainder to the Heires of the body of the Husband, the remainder to the right Heires of the Husband; and they so being seised, the Husband alone leved a fine to a stranger, Sur Conusans de droit come ceo, &c. and by the same fine the Connsee rendred to the Husband and Wife in tail, the remainder to the Heires of the body of the Husband, the remainder to the right Heires of the Husband, the Husband dyed seised, the Wife entred and leased the said Mannor to the Plaintiff, and then the Church did become void: And now the Queens Serjeants came and shewed unto the Court an Office, which came in by Mitimus: In which Writ the perclo is, Mandamus vobis quod inspectis, &c. pro nobis fieri faciatis quod solum leges & consuetudinem Regni nostri Anglie faciend. Statuetis; And the Office did purport, that the said Richard was seised of the said Mannor, and held the same of the Queen, as of her Castle of Dover, by Knights service in cheif, and leved the fine, usurper, and that the said Richard dyed, sed quis sit propinquior hares dict. Ric. penitus ignorant; and upon that Office prayed a Writ to the Bishop for the Queen: And two Exceptions were taken to the Office, first because it is not found by the said Office that the said Richard dyed seised, in which Case it may be for any thing that appeareth in the Office, that the said Richard after the said fine had conveyed his estate in the said Lands unto others, as that he was disseised, &c. Sec 3 H 6. 5. If it be not found of what estate the Tenant of the King dyed seised, the Office is insufficient. But see there by Martin, that such an Office is good enough for the King, but not for the Heir to sue his Liberty upon it. And by Anderson, Periam, and Rhodes, that defect in the Office is supplied by the Count, for there it is expressly alledged, that the said Richard dyed seised. Secondly, because no Heir is found by the said Office. To which it was said by the Lord Anderson, that peradventure at the Common Law the same had been a material Exception. But we ought to respect the Statutes of 32 and 34 H 8. of Wills. And therefore as to the Wife the Queen is entitled to Primer seisin, because the conveyance was made for her advancement: And by Windham, the Queen in this Case shall not have Primer seisin, for by the Statute the Queen shall not have Primer seisin, but in such Case, where, if no conveyance had been made, the Queen should have had Primer seisin, but in this Case for any thing that appears before us, if this conveyance had not been made the Queen should not have had Primer seisin, so much as no Heir is found, & if he dyed without Heir there is no Primer seisin, because there is not any in rerum natura to sue liberty. Rhodes, Periam
and

and Anderson contrary; Admitting that Richard dyed without Heir, the Queen shall have Primer seisin against the Wife of Richard, notwithstanding the deceit. Walmesley Serjeant, If the Tenant of the King by Knights service in cheife dyeth seised of other Lands holden of a common person by Knights service, without Heirs, the King shall not have Primer seisin of such Lands holden of a Subject, which Windham granted: But by Anderson the Writ is put to sue an Ouster le mayne of the Land holden of him. And afterwards Exception was taken to the Count, because the Plaintiff hath not averred the life of the Tenant in tail, that is, of Bennet the Wife of Richard, to whom the Land was entailed by the second fine: But that Exception was disallowed by the whole Court, and a difference put by Anderson. Where a man pleads the grant of an Advowson in grosse by Tenant in tail, in such case the life of the Tenant in tail ought to be averred, for by his death the grant ceaseth. But where a man pleads the lease of Tenant in tail of a Parson with an Advowson appendant, in such case such averment is not necessary: So accordingly Smith and Stapletons Case, 15 Eliz. 431. And here it was moved, if, in as much as by the first fine an estate for life was rendered to the Wife, and by the second fine, in which she did not join, an estate tail was limited unto her, and now when the Husband dyeth if he shall be remitted to her estate for life, which Windham granted, for that was her lawful estate, and the second estate tortious: But by Rhodes, Periam, and Anderson the Wife is at liberty to make her election which of the two estates she will have. And as to the Writ to the Bishop for the Queen, the Court was clear of opinion, that it ought not to be granted upon this matter: But all the question was, if Regina inconsulta, the Court would or ought to proceed: And it was holden clearly by the whole Court, that the tenure alledged, modo & forma, could not be a tenure in cheife, for it is said, that the Land was holden of the King, as of the Castle of Dover, in Capite.

LXXXVI. Mich. 29. and 30. Eliz. In Communi Banco, Instr.
Pasch. 28. Eliz. Rot. 602.

Walt.

WAs it was brought by F and his Wife against Pepy, and counted, that the said Pepy was seised, and enfeoffed certain persons to the use of himself for life, and afterwards to the use of the Wife of the Plaintiff and her Heires. The Defendant pleaded, that the said Feoffment was unto the use of himself and his Heirs in Fee, &c. without that, that it was to the uses in the Count, upon which they were at issue: And it was found by verdict, that the said Feoffment was unto the uses contained in the Count: But the Jury further found, that the estate of the Defendant by the limitation of the use was privileged with the impunity for Writ, that is to say, without impeachment of Writ. And it was moved, if upon this verdict the Plaintiff shall have Judgement: And Anderson and Rhodes Justices, he shall, for the matter in issue is found for the Plaintiff, and that is the Feoffment to the uses contained in the Count: and this impunity of Writ is a foreign matter not within the charge of the Jury, and therefore the traverse of it but matter of surplage. As if I plead the Feoffment of I-S. To which the other pleads, that he did not enfeoff, and the Jury find a conditional Feoffment, the Court shall not respect the finding of the condition, for it was not in issue, and no advantage shall ever be had of such a liberty if it be not pleaded. 30 H. 8. Dyer 47. In Dover the Tenant pleaded, Ne unquam seisi que Dover, the Tenant pleaded, that before the coverture of the Demandant, one A was seised of the Lands, of which Dover is demanded in tail, who made a Feoffment to a stranger, and took the Demandant to Wife, and took back an estate in Fee, and dyed seised, having issue inheritable: Now although upon the truth of the matter she is not

not dowable de jure, yet when the parties are at issue upon a point certain, no foreign or strange matter not in question betwixt the parties shall be respected in the point of the Judgement. But if the Defendant had pleaded it in barre, he might have foreclosed the Demandant of her Dower: Vide 38. H. 6. 27. 47. E. 3. 19. In a Præcipe quod reddat in the default of the Tenant one came and shewed how the Tenant who made default was but Tenant for life of the Lands in demand, the reversion in fee to himself, and prayed to be received. The Demandant did counter-plead the receipt, saying, the Defendant had fee, upon which issue was joyned. And it was found, that neither the tenant, nor he which prayed to be received, had any thing in the Land: In that case the Court did not regard the matter which was superfluous in the verdict, for they were at issue upon a point certain, that is, whether the Tenant was seised in fee, for it was confessed of both sides, that he had an estate for life; and with that matter the Jury was not charged, and they are not to enquire of it, and so it was found against the Demandant, for which cause the Receipt was granted. 7 H. 6. 20. The parties were at issue upon a dying seised, which is found by verdict, but the Jury further find, that the other party made continual claim; this continual claim shall not be regarded in the point of the Judgement, because it was not pleaded in avoidance of the descent. Windh. Justice contrary: forasmuch as it appeareth unto us upon the verdict, that the Plaintiff hath not cause of Action, and therefore he shall not have Judgement; As in Detinue, The Plaintiff counteth of a bailment by his own hand; the Defendant pleadeth, that he doth not detain, &c. the Jury find the Detinue, but upon a bailment by another hand: In this case, notwithstanding that the Detinue be found, yet the Plaintiff shall not have Judgement: But Rhodes, Periam, and Anderson in the principal case were of opinion, Judgement should be given for the Plaintiff, for in no case the party shall have advantage of such a Liberty of impunity of Waste, if he do not plead it, And the Jurors are not to meddle with any matter which is not in issue: And if it be but matter of surplussage, it is to no purpose. And afterwards Judgement was given for the Plaintiff.

No advantage of impunity for Waste shall be taken, where the same is not pleaded though found by verdict. Judgement.

Mich. 29. & 30. E. 12. In Communi Banco.

L X X X V I I. Bracebridge & Basketvilles Case.

An Action of Debt is brought against three Executors, one of them pleads in Bar a Recovery against himself in the Kings Bench: The other two plead plene administrat. Against the first plea the Plaintiff did averre, contrary; and upon the second plea they are at issue: The first issue is found for the Plaintiff, and as to the other plea, it was found, that the Defendants have in their hands thirty pounds of the goods of their Testator not administered. Note, the debt in demand was one hundred pounds, upon which the Plaintiff had Judgement to recover the goods of the Testator, and thereupon had execution: Now the Plaintiff brought a Scire facias against the said Executors, supposing that many other goods of the Testator have come unto their hands after the Judgement, and prayed execution thereof: upon which the Defendant did demurre in Law. Vide 21 H. 6. 40. 41. In debt against Executors of forty marks, the Defendant pleaded, that he had fully administered, and it was found, that the Defendant, at the day of the writ brought, had of the goods of the dead twenty marks and no more, and gave damages five marks. Where the Plaintiff had Judgement for the twenty marks of the goods of the dead, and the five marks of their own goods: And as to the other twenty marks, that the Plaintiff should be amerced: 33 H. 6. 24. Where Executors plead, that they have nothing in their hands, which is found accordingly: After-

Debt against Executors.

Scire facias, to have Execution of Assets come to Executors hands, after rejus enter maynes pleaded.

towards goods of the Testator came to the hands of the Executors: Now the Plaintiff upon a surmise shall have out of the same Record a Scire facias to have execution of the said goods: But see 4 H. 6. 4. contrary, for there it is said, that upon the matter the original is determined, and so no Record, upon which a Scire facias can be grounded: And see Fitzh. abridging the Case Scire facias, 25. by the verdict and the Judgement the Original is abated: Vide 7 E. 4. 9. by Moile, according to 31 H. 6. and so 46 E. 3. 9. by Belknap. And the Lord Anderson demanded of the Prothonotaries the manner of the entry of the Judgements given in such Cases, who said, that their Entry is in this manner: (i. e.) Quod quereas recuperet, that which is expressly found by the verdict, but nothing of the residue, for of that no mention is made at all. And the Court seemed to be of opinion, that where, upon nothing remaining in their hands, pleaded, It is found that some part of the sum in demand is in the hands of the Executors; there the Plaintiff upon a surmise of goods come to the hands of the Executors shall have a Scire facias; contrary, where upon such issue, it is found fully for the Defendants, that they have nothing in their hands.

Mich. 29. and 30. Eliz. In Communi Banco.

LXXXVIII. Fordleys Case.

Tender pleaded.

Fordley brought debt upon an Obligation, the Condition was, that if the Defendant, viz. the Obligor deliver unto the Plaintiff the Obligees, at such a day and place, twenty pounds as ten nine, at the then choice of the Obligees, &c. that then, &c. The Court was clear of opinion, that the Defendant in pleading the performance thereof ought to tender to the Plaintiff as well the twenty pounds as the ten nine, and for default thereof Judgement was given against the Defendant. See the Number Roll T 29 Eliz. 1. part. 324. vide 14 E. 4. 4. b.

Mich. 29. and 30. Eliz. In Communi Banco.

LXXXIX. Barker and Pigotts Case.

Debt.

Edward Barker brought Debt against Rich. Pigott Executor of the Will of E, Executrix of the Will of R. The Defendant pleaded, that he had fully administered the goods of his Testator E, upon which they were at issue, which was found for the Plaintiff. And it was moved in arrest of Judgement, that here is not any issue joined, which answers to the Action, for the Action is brought against the Defendant in the quality of the Executor of an Executor, and the verdict extends to the Defendant, but is Executor of the said E, for it is found by it, that the Defendant hath fully administered the goods of his Testatrix, without any enquiry of the Administration of the goods of the first Testator R, in which capacity the Defendant is charged. So as here the Will charges the Defendant in the quality of an Executor of an Executor; and in respect of the first Testator, and the issue and verdict both concern the last Testator: And the whole Court was clear of opinion, that although that now after verdict fee tail be saved, and no Judgement shall be given upon it, yet here the Court shall give Judgement as upon a Nihil dicere, in which case the Execution of the Judgement shall not fall upon the goods of the last Testator according to the verdict, but shall follow the nature of the Action which was brought against the Defendant as Executor of an Executor.

Execution must follow the nature of the Action.

Mich.

Mich. 29 and 30. Eliz. In Communi Banco.

XC. Thacker and Elmers Case.

Thacker recovered in an Assize of Novel disseisin against Elmer casteln Lands in Hackney, and had execution: Elmer entred upon Thacker and ousted him, and Redisseised him. Thacker re-entred, and afterwards brought a Redisseisin; And it was moved, whether Thacker against his Entry might have a Redisseisin: And the opinion of the whole Court was, that he might well maintain the Writ, for he is not thereby to recover any Land; but the Defendant of that Redisseisin being convicted, shall be fined and imprisoned, and render double Damages: Vide Book Entries 502. the Judgement in a Redisseisin is, Quod recuperet seisinam suam of the Land.

Re-disseisin,
and the Judg-
ment in it.

Mich. 9 and 30 Eliz. In Communi Banco.

XCII. Blaunchflower and Fryes Case.

Blaunchflower brought debt upon a Bond against Elinor Frye, as Executrix of one Andrew Frye her late Husband, who pleaded, that this Writ was brought 9. July, 27 Eliz. whereof she had notice the first of October after, with in which time one Lawrence had brought an Original Writ against the said Elinor as Administratrix of the said Andrew: And after the bringing of the Writ, the Bishop of Bath and Wells committed Administration of the goods of the said Andrew to the said Elinor, which Elinor confessed the Action, upon which Judgement was given for the said Lawrence, beyond which she had not goods, upon which the now Plaintiff did demurre in Law. And by Anderson, the Recovery pleaded in barre shall not bind the Plaintiff, because it appeareth upon the plea of the Defendant, that the Administration was committed after the Writ purchased, which matter if the Defendant had pleaded, Lawrence could not have had Judgement to recover. As where there are three Executors, and debt is brought against two of them, if they do not plead that matter in abatement of the Writ, but plead, &c. or confesse the Action, so that the Plaintiff hath Judgment to Recover, that Recovery shall not bind a stranger who hath cause of Action against them, but that he may well satisfy it, and yet it was said that in such Case, the Defendant by the obtaining of the Letters of Administration had made the Writ good against her, vi. 13 H. 4. Fitz. Executors, 118. Administration committed before the Writ purchased shall abate the Writ brought against the Defendant as Executor, but such Administration obtained, depending the Writ, shall not abate it, vi. 21 H. 6. 8. 2 R. 3. 26. Another matter was moved by Anderson, because the Defendant had pleaded a Recovery by confession had against her without Aderment that it was a true Debt, in which Case Cobin is presumed, Windham and Periam were of opinion, that the matter of Cobin ought to come in on the part of the Plaintiff, which Anderson denied, vi. 9 E. 4. 13, 14. 33. the Cardinalls Case.

Administra-
tion granted
pendant the
Writ.

In Communi Banco Intrat. Mich. 26. & 27. Eliz. Rot. 12.

XCII. Basset and Kerne Case.

Basset the Executor of Morris Sheppard brought debt upon a Bond against Kerne, the Case was: That Kerne was bound to Morris in an Obligation Debt by Exe-
cutors.

Election.

upon Condition, that the said Kerne should pay to the said Morris his Execut^{ors}, &c. at the choice and election of the said Morris, within a moneth after the death of the Lady Kerne, thirty pounds, or twenty Rine, to which the Defendant pleaded that the Plaintiff within the moneth after the death, &c. did not make any choice or election, upon which the Plaintiff did demur in Law: And the Court was clear of opinion, that it was a good Plea in Bar, for the Obligor is not bounden to make a tender of both, viz. of the money and the Rine; but the Obligee himselfe is bounden at his perill to make election within the time limited; As if I be bounden to you, to make unto you such further assurance within such a time by fine or feoffment as you shall choose, it behooveth you to make election of your assurance, fine, or feoffment, and in the principall Case, the election of the Plaintiff ought to preceede the tender of the Defendant: vi. the Lord Lilles Case, 18 E. 4. 15. 17. 20, 21. Where the Defendant was bound to the said Lord to shew his Evidences touching such a House to the said Lord or his Conncill, the election was to the Defendant to whom he would shew them, and there by Brian, if I be bound to you to marry your Daughter, or to go to Yorke on your Business upon request he, soe you require me to marry your Daughter I may do it, or go to Yorke, which Coke granted, vi. 13 E. 4. 4. Where the condition is in the disjunctive, before the day of performance the election is to the Defendant, but if at the day he make default, the Election is to the Obligee; vi. 9 E. 4. 36, 37. And by Windham, if I be bounden unto you in an Obligation of ten pounds, to pay to you such a day ten pounds in Gold, or Silver, if you do not make your election before the day, yet the duty remaines payable, for the thing to be paid is parcell of the penalty, quod fuit concessum; And as to the principall Case, the Court was clear of opinion, that upon this matter the Plaintiff should be barred: See before this Terme, Fortekyes Case.

Mich. 29 & 30. Eliz. In Communi Banco.

XCIII. Searches Case.

Habeas Corpus.

A Habeas Corpus issued forth out of the Court of Common Pleas, to the Steward & Marshall of the House, &c. for one Wil. Search, which was returned in this manner, viz. quod Domina Regina per litteras suas Patentes suscepit, in protectionem suam regiam, Johannem Mabbe, and his sureties, and of her further grace by the said Letters, voluit, that if any person should arrest, or cause to be arrested the said John Mabbe or any of his sureties, that then the Marshall of her House, or his lawfull Deputy might arrest every such person, and detain them in Prison untill such person should answer before the Privy Counsell for the contempt; And that the said William Search caused one John Preston one of the said sureties of the said John Mabbe to be arrested, &c. And upon that returne, the said William Search was discharged; And alia because that after the said discharge the parties caused the said William Search to be arrested againe for the same cause, that is by colour of the said protection; An Attachment was granted against them.

Note, that the same Terme, Mich. 29. and 30. Eliz. Another Habeas Corpus was directed to the Steward and Marshall of the Marshalsey, Habeas corpus for one Howell, who made returne, that the said Howell was committed to his custody, per mandatum Francisci Welsingham militis Principalis Secretarij, & unius de privato concillio Domine Regine, and that returne was by the Court holden insufficient, because the cause upon which he was committed, was not set down in the returne; and therefore day was given to amend

amend the returne, and now they returned the writ in this manner, *It infra nominatos Johannes Howell concessus fuit, &c. ex sententia & mandato totius concillii privati Domine Regine*; Ita quod corpus ejus habere non possumus, &c. And that returne was also holden by the Court to be insufficient for (by whatsoever person, or by what meanes soever he was committed) the conclusion of the returne ought to be, *Corpus tamen ejus paratum habeo*, and if it shall seem good to the Court, that the Prisoner shall have his Priviledge, and shall be dismissed, he shall be discharged, but if not, then he shall be remanded, and the Court took a difference, where one is committed by one of the Privy Councill, for in such case the cause of the committing ought to be set down in the returne; But contrary where the party is committed by the whole Councill, there no cause need to be alleged.

Mich 29 and 30. Eliz. In Communi Banco.

XCV. Bret and Audars Case.

Bret brought Debt upon an Obligation against Audar, the Condition of which Obligation was, that the Defendant should stand to the Award, &c. And the Arbitrator awarded, that the Defendant should pay unto the Plaintiff ten pounds, without naming day or place; And as to that the Defendant pleaded, that he was alwayes ready, and yet is, &c. without shewing any tender: And it was moved, That although that would have been a good Plea in debt upon an Arbitrament, as the Case is, 7 H. 4. 97. See 21 E. 4. 40, 41, 42. Yet now by the Obligation and the Condition of it, the sum is payable in another manner then it was before, see the pleading of the Case, 21 E. 4. In Debt upon an Obligation to performe the Award; That the Award was made between the Termes of Pasch. and Trinity, and before the eighth of September after, tendered the twenty pounds, and the Plaintiff refused it. And the Lord Anderson put a difference between the Case, in 21 H. 6. 37. And the Case at the Bar, for in our Case the Obligation doth precede the duty which accrue by the Award subsequent, but in the former Case the duty did precede the Obligation which was made for the further assurance of the duty: And here the Defendant ought to have pleaded the tender, and see 14 E. 4. 4. A is bound unto B, that where he hath granted to the said B a Rent-charge out of such Land, now if the said B shall enjoy the said Rent according to the forme and effect of the said Grant, that then, &c. there he needs not to plead any tender, for the Rent is not payable in other manner then it was before, contrary if the Condition had been for the payment of the Annuity, And of that opinion was the whole Court, that he ought to have pleaded a tender. Another matter of the Award was, that the said Audar should yeild up, his tender, and relinquish to the Plaintiff all such Houses and Tenements which he had in his possession, by reason of the custody of the said Plaintiff: As to that the Defendant pleaded, that he had yeilded up, &c. All such Houses, &c. generally without shewing which in certaine; And for that cause the Court was clear of opinion, that the Plea was not good; which see 9 E. 4. 16. If I be bounden upon condition to enfeoff the Obligor of all Lands, Tenements, which were to I S, in pleading the performance of that Condition, I ought to shew what Lands and Tenements in certaine, for they passe out of me by the Feoffment; See also 12 H. 8. 7. 13 H. 8. 19. Another point of the Award was, That the said Audar should acquit and discharge, and save harmless the Plaintiff of such an Obligation, to which the Defendant pleaded, that *Quere non fuit damnificatus*, and that Plea was holden insufficient, for he ought to have shewed, how he had discharged him, and it is not sufficient to answer only to the damnification, as if I be bounden to convey unto you the Spanna of

Debt upon a
Bond to per-
form Award.

Tender:

Non damnificatus, generally,
where no Plea:

of B, in pleading the performance of the condition, it is not sufficient to shew, that I have conveyed the said Pannoz, but to shew by what manner of conveyance, viz. by Fine, or Feoffment, &c. 22 E. 4. 43. If the condition be to discharge the Plaintiff, &c. then the manner of the discharge ought to be shewed, but if it be to save harmless only, then non damnificatus, generally is good enough, 40 E. 3. 20. 38 H 6. 39. The condition of an Obligation was, that the Obligor should keep without damage the Obligee, of such a sum of money against B, to whom he was bounden for the payment of it, and the said Obligor pleaded, that at such a day, &c. the said B at his request delibered the Obligation to the Plaintiff in leiw of an acquittance, without that, that the Plaintiff was dammified by the said Obligation, before the delivery of it, and it was holden by the Court, that if the Defendant had pleaded, that he had kept the Plaintiff without damage, and had not shewed how, that the Plea had not been good, See 22 E. 4. 40. The Lord Lilles Case. And afterwards Judgement was given for the Plaintiff.

Mich. 29. and 30. Eliz.

XCVI. Heydons Case.

Ralph Heydon pretending title to certaine Land, entred into it, and made a Lease of it to try the title: Upon which his Lessee brought an Ejectione firmæ, in which the parties were at Issue; And now at the day of the Enquest, the Jurors were called, and but five of them appeared, whereupon, the Defendant came and shewed to the Court, that the said Heydon by his Friends and Servants, had laboured the Jury, not to appear, and that for the further vexation of the Defendant who had four Servants in assistance of his title, and that the said Heydon to procure the Jury not to appear, had promised to them, that he and the Defendant were in course of an agreement, whereas in truth no such communication of agreement had any time passed betwixt them: And all this was openly deposed in Court, as well upon the oath of the Defendant himselfe as upon the oath of one of the Jurors, upon which the Court awarded an Attachment against the said Heydon, to answer the contempt; And also granted to the Defendant, that he might sue a Decemtales with proviso, for his own expedition.

Mich. 29. and 30. Eliz. In Communi Banco.

XCVII. Smith and Kirfoots Case.

Debt upon Arbitrament.

Smith brought Debt upon an Arbitrament against Kirfoot, and declared that the Defendant and he, imposuerunt se in arbitrium, ordinationem, & judicium, Johannis Popham ar. arbitratoris indifferenter electi, de jure, titulo, & interesse in quibusdam Messuagijs, &c. Who taking upon him the burthen of the Arbitration, ordinavit, that the said Defendant should pay unto the Plaintiff ten pounds, in plenam satisfactionem, &c. and thereupon he brought his Action; It was moved by Walmesley Serjeant, that the Declaration is not sufficient, for it appeareth that the Arbitrament set forth in the Declaration is utterly void; because whereas ten pounds is awarded to the Plaintiff, nothing is awarded to the Defendant, and so the Award unequal, and so void. But the Court was clear of opinion, that notwithstanding that such an Arbitrament be void in Law, yet it may be for any thing that appeareth, that the award is good enough: For the Plaintiff is not to shew in his Declaration all the Award, but such part only of it which doth entitle him to the thing,

thing, &c. and if the Defendant will impeach the Award for any thing, that is to come in on his part, vi. ac. Book Entries, 152. 123. vi. For the Arbitrament, 39 H. 6. 12. by Moile, 7 H. 6. 41.

Mich. 29. & 30. Eliz. In Communi Banco.

XC VIII. Arundell against Morris.

Richard Arundell sued an Audita Querela against Morris, and it was comprehended in the Writ; That Morris had recovered against him a certaine Debt, and that he was taken by a Capias ad satisfaciendum, at the suit of the said Morris, by Hickford Sheriff of the County of Gloucester; who let him go at large, &c. And they were at issue, upon the voluntary escape, and it was found for the Plaintiff: It was objected in arrest of Judgement, that the Writ of Audita Querela is not good, for the word are, that the Plaintiff, capius fuit virtute brevis nostri judicialis, whereas this word (judicialis) is not in the Register; but only brevis nostri de capiendo. But by the whole Court, the Writ is good, for the word (judicialis) is but a word of surplusage, and shall not make void the Writ: And afterwards Judgement was given for the Plaintiff.

Mich. 29. & 30. Eliz.

XC IX. Brook against King.

If Debt upon an Obligation by Brook against King, the Defendant pleaded, that the Bond was enjoined, with such condition, viz. That if the said Defendant King shall procure one IS to make reasonable recompence to the Plaintiff for certaine Beasts which he wrongfully took from the Plaintiff, that then, &c. And he said in fact. That the said IS had stolen the said Beasts from the Plaintiff, and thereof he was indicted, &c. and so the condition being against the Law, the Obligation was void, upon which the Plaintiff did demur in Law. And it was argued by the whole Court: That where the condition of an Obligation shall be said against the Law, and therefore the Obligation void, the same ought to be intended where the Condition is expressly against the Law in expresse words, and in terminis terminantibus, and not for matter out of the condition, as it is in this case; And Judgement was given for the Plaintiff.

Mich. 29. & 30. Eliz. In Communi Banco.

C. Hawks against Mollineux.

If a Replevin by Hawks against Mollineux who abated for Damage-feasant; The Plaintiff in Bar of the Abovory, pleaded that Sir Gervase Pison Knight, was seised of a Messuage and twenty Acres of Lands; And Replevin. that alwayes those whose estate, &c. have used to have Common in the place where, &c. for all their Cattell commonable in this manner, viz. If the said Land be sowed by assent of the Commoner, then no Common, until the Cozne be mowed, and when the Cozne is mowed, then Common until the Land shall be sowed againe by assent of the Commoners: And this Prescription was found by Verdict, and exception was taken to this prescription because against common right, so as a man cannot sow his Land without the leave of another. But the exception was disallowed by the Court, for the prescription was holden to be good by the whole Court, for by the Law of the Land, the Owner of the Land cannot plow the Land where another hath common; but here is a benefit to each party, as well for the Owner of the Land against the Commoner, as for the Commoner against the Tenant of the Land, for each of them hath a qualified Interest in the Land:

Intr. Pasch. 29. Eliz. Rot. 1410. In Communi Banco.

C I. Baldwin and Cockes Case.

Replevin.

Baldwin was Plaintiff in a Replevin against Cockes, and upon the pleading the Case appeared to be this, That Sir Richard Wayneman was seised of the place where, &c. and leased the same to one TruPENy and one Eliz. Reade for term of one and twenty years, if the said TruPENy and Eliz. or any child or children betwixt them begotten should live so long, Elizabeth within the term dyed without issue; If now the term for one and twenty yeares be determined was the Question. And the Lord Anderson conceived, that the estate for yeares is not determined by the death of Elizabeth. And it was argued by Shuttleworth Serjeant, that upon the matter the term is determined: And he put the Case of the Lord Bray, 3 Eliz. Dyer 190. Where the Lord Bray sold unto four great Lords the marriage of his Son and Heir, to the intent to be married at the appointment and nomination of the said Lords, the Lord Bray dyed, one of the said Lords before any marriage, or appointment, or nomination, dyed, the Son is married by the appointment, &c. of the surviving Lords; That marriage is not within the intent of the Covenant, and adjudged that upon that marriage no use should accrue. And also: cited this Case adjudged in the Kings Bench. The administration is committed to one durante minore etate of two Infants, one of them becomes of full age, the power of the Administration is determined, which Walmesley Serjeant granted, for it is but an authority; but here in the Case at Barre is a matter of interest. And by Anderson all the construction of this lease and grant rests upon this point, if this word (Or) either shall be taken as disjunctive as it is in its nature, or as a conjunctive, and if it be taken as a disjunctive, if it make the whole sentence in the disjunctive, as if the limitation had been, if the Husband or Wife or any Child, &c. And Fenner, put this Case out of 17 E 3. as he cited it. Land is given to I S in Fee so long as A B hath issue of his body. A B dyeth without issue, his Wife, privimen. ensient. Now the estate is determined, and upon birth of the issue after shall not revive, which Rhodes and Anderson denies, for in many Cases the Law shall respect the efficacy of the child in the mothers belly: And see 7 Eliz. Plow. 289. where a Copulative shall be taken in the disjunctive, as a covenant with B to make a lease for years of such Lands to the said B and his Assignes, the same shall be construed, or his Assignes. And it was clearly agreed by the other parties, that if the words had been, If TruPENy, Elizabeth, or any child or children, &c. so long, &c. upon the death of any of them the interest is determined: And by Rhodes, Periam and Windham in the principal Case, the lease shall endure as long as any of the persons named in the Proviso shall live, and so seemed to be the meaning of the parties. And Anderson hesitated in the words of the limitation, i. the Habendum to the said TruPENy and Eliz. for one and twenty years a festo Sancti Johannis Baptist. post terminum annorum (the expiration of a former term) if the said TruPENy and Elizabeth, or any child, &c. And he conceived, that the limitation did go to the commencement of the lease only, and not to the expiration or determination, as if the lease should not begin if they all were not alive at the commencement of the lease: And all the other Justices were clear of the contrary opinion, for by them this limitation shall go, and shall be referred to the determination of the Lease, and not to the commencement of it.

And by Anderson, if any cause should be, for which the lease should endure until the yeares be entured, notwithstanding the death of the Husband or Wife, it was because the lease was intended a common advancement to both,

for

Exposition of
words in
deeds.

for it should be in vain to name the Wife in the lease, if the lease should cease by the death of the Husband. And afterwards after many arguments on both sides, it was adjudged, that by the death of Elizabeth, the lease was not determined, for the disjunctive, before (Child) makes all the limitation in the disjunctive.

Mich. 29. & 30. Eliz. in Communi Banco.

CII. Zouch and Bamfeilds Case.

The Case between the Lord Zouch and Bamfeild was now argued by the Justices. And Rhodes the puisne Justice argued, that the Lord Zouch the Demandant should be barred; four Exceptions have been taken to the barre: first, because it is not shewed in the barre that the moiety of those six messuages, &c. of which he pleads the fine, was parcel of the Mannor at the time of the fine levied; for the pleading is, that the Grandfather of the Demandant was seised of the said Mannor; unde medietas praeclorum &c. messuagiorum, &c. a tempore cujus contrar. memoria, &c. was parcel, and so seised de manerio praecl. unde, &c. Finis se levavit; and he conceived that the pleading, notwithstanding that was good enough; for he hath said as much in effect, contrar. cujus memoria hominum non existit, in the present tense, which amounts to this, that men cannot remember, &c. but that this moiety was parcel of the said Mannor: As 10 H 7. 12. In an Assize of common, the Plaintiff makes his title, that he was seised of a Messuage and carbe of Land in D, to which the said Common is appendant, and that he and all his Ancestors, and all those whose estate he hath, &c. have used to have Common, &c. Exception was taken to the title, because the Plaintiff doth not shew in his title, that he is seised of a Messuage, &c. for if he hath aliened the Messuage, the Common passeth, so if he be disseised, &c. but the Exception was not allowed, for it appeareth upon the words of the title, that the Plaintiff is seised: i. all those whose estate he hath in the present tense, which words do shew and declare possession and seisin in the Plaintiff, the time of the plea pleaded, so in this case, the substance of the words, in which the defect is assigned, is ut supra; That men cannot remember, but that this moiety was parcel of the Mannor, and then the words after, unde, &c. reddidit Manerium praecl. unde &c. shall have the same construction as before. Periam conceived, that the Barre is nought for the cause aforesaid, for it is not so pleaded, that we can adjudge upon it, that the said moiety was parcel of the Mannor at the time of the fine levied, and then the fine cannot extend unto it. And the reason alleged by my brother Rhodes shall not help that matter, for the said words cannot be construed otherwise, but that no man can remember but the said moiety was parcel, but not that it is parcel, or at the time of the fine levied was parcel. Vide 32 H 6. 24. In Trespass, the Defendant pleaded, That A was seised of the Mannor of D, whereof the place, &c. is parcel, he ought to say expressly, that the place where was parcel of the Mannor at the time of the trespass supposed: Windham conceived, that the plea was good, and that it appeareth well upon this plea, that the said moiety was parcel of the said Mannor at the time of the fine levied, for he pleads, that the Grandfather of the Demandant was seised of the Mannor of N; Unde medietas praeclorum, &c. a tempore cujus contrar. memoria hominum non existit, & sic seiscitus existens, Finis se levavit; sic seiscitus; i. e. seised of the Mannor in such sort, as the Mannor is set forth before, and that is good pleading, especially by way of bar, which if it be good to a common intent, is well enough: and the word (unde, &c.) so often repeated after shall be idle and to no purpose if the Law shall not give such a construction. Anderson to the same purpose. And he much

Averrements,

relyed upon the reason of Windham, and so joined. Another Exception was taken to the Barre, because in pleading of the Fine, it is not averred, that the Consoz at the time of the Fine leyed was of full age, out of prison, &c. And as to that Rhodes took the difference between the pleading upon the Statute of 1 H 3. where these disabilities are within the purview of the said Statute, and upon the Statute of 4 H 7. where in the body of the Statute no mention is made of them, but afterwards in an especial Exception by it self, and he cited the opinion of the Justices, especially of the Lord Dyer in the Case reported by Plowden. 3 Eliz. 305. betwixt Scowel and the Lord Zouch: Periam to the same intent, and upon the same reason, and further he said, that although the Statute of 32 H 8. contains in its purview the same disabilities; yet this Fine is pleaded upon the Statute of 4 H 7. and therefore the pleading of the same shall not be directed nor waged by the Statute of 32 H 8. which doth not alter the pleading of a Fine which was before, nor the reason of it; for it is not properly a Statute, nor do Fines receive any strength or virtue by it, but is but a construction of the said former Statute. And he put the Case betwixt Hide and Umpton; where Umpton meant betwixt the Statutes of 32 and 34 H 8. Declared his Will of all his Lands, which devise if it be good for two parts of the Land devised it was doubted, or that the devise should be void for the whole, afterwards, came the Statute of 34 H 8. and cleared the doubt, for to that intent it was made, and in the said Statute there is a Proviso, that the said Statute shall not extend to the Will or the Devise of Tho. Umpton, or shall be prejudicial or hurtful to any person or persons for any Lands, &c. contained or specified in the said Will or Devise, but that the said Will and Devise shall stand, remain and be in the same case, in force and effect in the Law, as the same was before the making of this Act. Now, notwithstanding that Proviso, the Will of Umpton was holden good but for two parts, for so the Statute of 34 H 8. confirms the Statute of 32 H 8. So in our Case, the Statute of 32 H 8. of Fines confirms the Statute of 4 H 7. to extend to Fines leyed by Tenant in tail, therefore the estate tail shall be adjudged in Law to be bound by the Statute of 4 H 7. and not by 32 H 8. which is rather a Judgment upon the said Statute of 4 H 7. then any new Statute. Windham to the same intent, and he relyed upon the reason aforesaid. And further said, if one will plead a Lease made by Tenant in tail upon the Statute of 32 H 8. he need not to aver the full age of the Lessor, and yet that quality of full age is within the purview of the said Statute. First, all Leases to be made, &c. by any person being of full age, &c. and so is the common use of pleadings. And of the same opinion was the Lord Anderson for the said Exception, for the reasons, and upon the difference aforesaid. Another Exception was taken to the Barre, because it is not alledged, that the said Fine was engrossed in the same Term in which it was leyed. And as to that, it was holden by Rhodes, that in pleading of a Fine it needs not to shew any engrossing of it; and so are many Presidents, vide Plowd. Com. Smith and Stapletons Case. 15 Eliz. 428. Where a Fine is pleaded, Quodam finalis concordia facta fuit in Octav. Sancti Hillarii 35 H 8. & postea a die Pasche. in quindecim diei 36 H 8. concessa & recordata, &c. Super quem finem proclam. secundum formam Statuti facta fuer. viz. prima proclam. 7. Maii. Term. Pasch. 36 H 8. without any mention of the engrossing of it: And see the Case betwixt Scowel and the Lord Zouch, where the Fine is pleaded as it is pleaded in the Case at Barre, qui quidem finis in forma predict. levatus (and that fine was leyed Pasch. 30 H 8.) ingrossatus fuit, & postea in Curia predict. secundum formam Statuti, &c. lectus, & proclamatus fuit, viz. prim. proclam. Term. Pasch. 30 H 8. And so upon the matter it is sufficient to shew, that the Fine was engrossed the same term in which it was leyed, for the Fine is pleaded to be leyed Term. Pasch. qui quidem Finis ingrossatus fuit, & postea proclam. vid. l. prim. proclam. Termino Pasch. which was the same Term it was leyed: And so,

admit

admit, that in pleading it ought to be shewed that the Fine was engrossed in the same Term in which it was leved, &c. Now it appears here to us by necessary consequence, that the Fine was engrossed accordingly. And also the Engrossment is pleaded as the Statute is penned, for the words of the Statute of 4 H 7 are, After the engrossing of every Fine, the same Fine to be openly read and proclaimed in the same Court, the same Term, and so the words of our plea here pursue the words of the Statute; for the said Statute doth not require by expresse words, that the Fine be engrossed the same Term, but the same is to be conceived by matter of construction and implication, and according to such manner of speech this plea is pleaded. And of the same opinion was Windham, and upon the same reason Anderson conceived, that the Tenant in pleading of the Fine ought to shew in expresse words, that the Fine was engrossed the same Term in which it was leved; for whoever in pleading a plea will take the benefit of the Statute ought precisely to follow the Statute in all points, and it is clear, that if the Fine be not engrossed, according to the Statute, that then it is not any barre by the Statute, and therefore it ought to be expresse alleged according to the Statute, and not by implication only.

Another Exception was taken to the Barre (as was remembered by Windham) i. pro ut per finem hic in Curia de recordo remanen. plenius apparet; without saying, & per proclamation. inde, &c. But that Exception was disallowed by Periam and Windham, for the Fine had been good and well pleaded; without any such conclusion, pro ut, &c. And also the proclamations are endorsed upon the Fine, and then they appear upon the Fine, according to the words of the said conclusion. And so by Windham are many Precedents; which so in the said Case between Scowel and the Lord Zouch cited before, pro ut per finem illum hic de record. remanen. plene liquet. And see 1 Eliz. Plowden 224. between Willion and Barkly, a Fine pleaded without any, pro ut, &c. Anderson took an Exception to the Barre at the beginning of it: i. Quod medietas 60. Messuagiorum, &c. parcel medietatis 70. Messuag. predict. that that is no good pleading; for one moiety cannot be parcel of another moiety, for every moiety is entire.

Rhodes took Exception to the Replevin, because the Demandant in avoidance of the fine, that at the time of the Fine leved Bamfeild was seised; & semper postea, & hucusque, &c. of the moiety in Demesne, and doth not traverse the seisin of the Conusor at the time of the Fine leved, for here two contrary pleas stand before us in equity of truth; æque vera, æque falsa, æque dubia, and a traverse would have made an end of all, and reduced the matter to certainty: And by Periam, the Barre is not answered, for every Barre ought to be traversed, confessed, or avoided, see 6 H 7. 5. and 6. where it is said by Hussey and Fairfax, where matter in fact is alleged by way of Barre it ought to be traversed, if it be not for the mischief of trial, as in case of Ballaroy, where a thing is alleged to be done beyond the sea; or to leave the matter in Law to the Court; without putting the same to the Judgement of the Lay people, &c. See also 5 H 7. 12. Where it is holden, that a thing material alleged in the Barre ought to be directly traversed, or confessed, or avoided in fact; or in Law, or conclude the other party by matter of estoppel: And that two affirmatives cannot make a good issue; But the matter alleged in the Replevin scil. that Bamfeild was seised at the time of the Fine leved shall be holden for void, and the matter alleged in the Barre, scil. that the Conusor was seised, as not answered, for it shall be taken true, until it shall be avoided and destroyed by matter in Law, traverse, &c. Vide Libram. So be in default of traverse, the Barre is not answered but argumentative, scil. Bamfeild was seised, ergo, the Conusor was not seised: And it is a common learning that in every Replication there ought to be certainty as to that: See the Case between Folmerston and Steward 2 Ma. 103. that a Bar ought not to be answered by argument:

gument: And as to the certainty which is requisite in a Replication. See the Case betwixt Wimbish and Talboies, Plow. Com. 4 E 6. 42. where the Plaintiff shewed in his Replication his title as Heir, but because he did not shew, how heir, for want of such certainty in the Replication, the Plaintiff could never have Judgment, although the Justices for the matter in Law then in question were clearly resolved for the Plaintiff, and here in this Replication the incertainty is such, that the Court doth not know to which to give credit, to the Plaintiff, or to the Defendant, and the bare matter of the Replication is not sufficient; for in avoidance of a Fine, to say, that a stranger to the Fine, at the time of the Fine levied, was seised, was never received, but that, partes Finis nihil habuerunt, that was the ordinary plea. Windham to the same intent; that which the Demandant hath alledged in avoidance of the Fine, is but matter of argument and implication. And we ought in this Case first to be assured of the matter of fact, scil. Whether Zouch or Bamfeild were seised, and the Court doth not know to which to give credit, 39 H 6. 49. in Debt by an Executor, the Defendant pleaded, that the Testator made the Plaintiff and one A his Executor, which A is living, and the Plaintiff pleaded, that the said A died within such a Year before the Will brought, &c. and adjudged no plea, without traverse, without that, he was dead, for here are 2 affirmatives, where, on a good issue cannot rise, which see 32 H 6. 23. The Def. in a Replication avows for a Kent service, the Plain. pleads, out of his Fee, the Avowant saith, within his Fee, he ought to traverse, without that that it is out of his Fee, and for default of the traverse the pleading of both parties, as to the several allegations of the seisin in Bamfeild and Zouch may be true, for they both might be Joynt-tenants of the said moiety at the time of the Fine levied, in which case, as to the moiety of the moiety it is good enough. And yet when in pleading it is alledged, that A was seised, &c. If the other party plead, that A had nothing but jointly with B he ought to take a Traverse, without that, that A was sole seised, and yet sole seisin is not expressly alledged but when the other party pleads, that A was seised, it ought to be intended a sole seisin. Which see 1 E 4. 9. 37 H 6. 31. And it was never a plea admissible against a Fine, to say, that the Conusor had nothing at the time of the Fine levied, which see 41 E 3. 14. and also 38 E 3. 1. 3. 8 H 6. 27. In Trespasse the Defendant pleaded the Fine of the Ancestor of the Plaintiff, who said, at the time of the Fine levied he himself was seised, without that that partes ad finem aliquid habuerunt, which see 46 E 3. 14. and a Fine ought to be avoided by not seisin of the parties to the Fine, and not by the seisin of a stranger to the Fine; and there is not any book in the Law that alloweth such an averment of seisin in a stranger to the Fine, without answering to the seisin of the parties to the Fine, but 13 H 8. In A Case, the Tenant pleaded a Fine upon Kender of the Ancestor of the Plaintiff, to which the Plaintiff said, that before the Fine, at the time of the Fine, and afterwards continually, he himself was seised, and the same was holden no plea against such a Fine upon a Kender, notwithstanding the proximity of blood; contrary against a Fine which proves a gift precedent.

Anderson to the same intent. The Replication for want of Traverse is incurable, for we as Judges do not know what to do, because that the truth of the matter in fact doth not appear unto us, and so neither the matter in Law, for every plea ought to be traversed, or confessed, and avoided, otherwise nothing appears to us, and we cannot know whether the Conusor or Bamfeild were seised at the time of the Fine levied, for otherwise the matter in Law cannot rise, and yet I well know, that although a traverse may be spared in respect of a matter in Law which should be choaked and put out of the book by the traverse, or for the mischief of the trial as aforesaid said, where a thing is alledged to be done beyond sea. 19 E. 4. 6. In debt the Defendant pleaded, that the Plaintiff was born at Denmark, under the obedience of the King of Denmark, the

the Plaintiff by Replication said, that he himself was born at D in England in the County of York, there he shall not take a traverser without that, that he was born at Denmark, for there such trial cannot be, but in such case the Defendant by way of Rejoinder shall say, that the Plaintiff was born at Denmark, without that that he was born at D in the County of York: And it is true, a supposal of a Verdict or Count may be answered to an Affirmative, but a matter alleged by expresse words cannot.

Rhodes, admitting now that the Barre be naught, and the Replication faulty, as it is, then I conceive, that if the point of the Action be confessed by the Barre, the Court shall give Judgement upon the Barre, and shall not meddle with the Replication, but if it be not confessed by the Barre, that then there shall be a Repleader. And I do conceive, that a Repleader may be awarded upon a Demurrer in Law: which see Plow. 1 Ma. in the case betwixt Browning and Beston 138. In Trespasse the Plaintiff doth suppose the Trespasse in two places, scil. in Bermestreet and in Southwark in the County of Surrey: as to the Trespasse in Southwark the Defendant doth justify by special matter of a Lease, without answering any thing to the Trespasse in Bermestreet. The Plaintiff doth reply, and makes his title by a Lease more ancient then the Lease to the Defendant; upon which the Plaintiff doth demurre in Law, shew the defect in the Barre appearing, the Court awarded a Repleader. And 9 H. 6. 35. in a Replevin the Defendant avowed for damage feasant. The Plaintiff made title by Common. The Defendant pleaded a Release of the Common by deed, which was not a perfect deed, upon which the Plaintiff did demurre in Law: And the Replication, in which the imperfect Release was, was holden nought, but because there was a defect in the Barre to the Avowry by the title of Common, the Court awarded, that the parties should replead, not in respect of the vitious plea upon which it was demurred, but in respect of the defect in the Barre: And so in this Case Periam said, that nothing should be awarded in this Case but where an Issue is joyned, for an Issue is alwayes joyned upon a point certain. But upon a demurrer all the parts of the pleading the Count, the Barre, &c. are referred to the Court, as well for the form as for the matter. The book which hath been vouched to the contrary out of 9 H. 6. I have procured search to be made for the Roll, but it cannot be found; it is inconvenient, that after a demurrer a Repleader should be granted, for then Causes should never have an end: And as to the Case betwixt Browning and Beston, the Repleader there was permitted by the assent of the parties, rather than awarded by the Rule of the Court.

Windham to the same intent, that no Repleader shall be in this Case, and he said, that in the time of the Lord Dyer the opinion of the Court was so: And as this case is, the plea in Barre being good, and the Demurrer being upon the Replication, no Repleader should be, for a Repleader shall never be granted, where the plea upon a Demurrer is not good, but if the Barre be not good, and the Defendant doth demurre upon the Replication, there a Repleader may be. And as to Browning and Bestons Case he conceived, that the parties did plead de novo, but not replead, for if it had been a Repleader, then the parties should begin to plead where the first defect was, as if the defect be in the Barre, there the Repleader shall begin, but the Declaration shall stand: But in the said Case of Browning and Beston, the Plaintiff pleaded all de novo, as a new Count, &c. and yet the first defect was in the Barre, and therefore he conceived, that there it was not a Repleader, but that the parties by assent did plead de novo.

Anderson was of opinion, that as this Case is, no Repleader shall be, and yet he held the Repleader might be upon a Demurrer as well as upon an Issue joyned; for a Demurrer joyned is an Issue to be tried by the Judges, &c. and such was the opinion of Manwood cheif Baron. And the Judgement in the Case betwixt Browning and Beston is not that the parties shall plead de novo,

novo, but that they shall replead. See there folio 138. a. and in that Case there might well be a Repleader, for there the truth of the matter in fact is confessed in the pleading, but in the Case at Barre it is otherwise, for the pleading is so obscure, that we do not know the truth of the matter, and the right of the matter doth not appear unto us.

And by Periam, as to that which hath been said, that upon the demurrer upon the Replication, the seisin of Bamfeild at the time of the Fine is confessed. Sir, it is not so, for no more shall be holden confessed by a demurrer, but that which is duly and sufficiently pleaded, and because the seisin of Bamfeild is not sufficiently pleaded, therefore not confessed, and for proof of that learning, see the Case betwixt Wimbish and Talbois; and the Case betwixt Hill and Graunge: 1 Mar. Plowd. 171. and see the Case betwixt Partridge and Croker; and so was the opinion of the Lord Anderson, who relied much upon the Case, where it is said, that in pleading a plea, all matters in fact well and materially alleged by a general Demurrer are confessed to be true.

Rhodes: Now we are to see, if by the Statute of 27 Eliz. cap. 5. This defect in the Replication may be salved, and I conceive, that this Statute doth extend to all imperfections which happen by the Act; Misposition, or negligence of the Clerks or Counsel, for the Client propounds his Cause to the Clerk and his Counsel to manage in the course of his sute, and if the Clerk or Counsel erre therein, or in that which to them belongeth: The Client as to that shall be releived by the Statute; but if there be any defect in the matter, so as the matter will not serbe, it is otherwise. As 5 H 7. 1. In the Roll of a plea there were divers spaces (for the year and day) void and blanch, now in another Term, the Judges could not amend them, but now by the said Statute they may. So colour in Assize wanting is helped by this Statute, so the usual averment, & hoc paratus est verificare, &c. left out, the Court hath power to amend it, and so by him the Court by this Statute hath power to amend that defect in Trespas.

Periam to the contrary. And that this default of Traverſe is not amendable by the said Statute, for it is enacted by the said Statute, that upon a Demurrer the Judges shall give Judgement as the right of the cause and matter in Law shall require, but in our case, as the pleading now is, no right of the cause or matter in Law appeareth according to which we can judge, for we upon this pleading cannot tell whether the Conuſor or Bamfeild was seised at the time of the Fine leved, for upon the Demurrer upon the Replication the seisin of Bamfeild is not confessed, because it is not well alleged: And if it had been well alleged, yet it had not been confessed, because that the Tenant who demurs upon the Replication, hath in his Bar expressly alleged, that the Conuſor was seised: An Original Writ of Debt against one as Executor in the debet and decinet could not be amended by 8. H. 6. but now by the Statute of 27. Eliz. it may, See 23 E. 4. 21, 22. So nominare for presentare in a Quare Impedit shall be now amended by this Statute, And in a Writ of Formedon, discendre for remanere shall be amended by the said Statute of 8 H 6. 44 E 3. 13. vi. 11 H. 7. 1, 2, 3. In Assize, upon whom the Plaintiff, where it should be upon whom the Defendant entered; And if the Averment usual as above was misse-set down, it was amendable, but if it were utterly left out, not, but now in both Cases it is amendable, so, defendit vim & injuriam quando, &c. if it be left out, it is amendable, for all these matters lye in the Conſuſance of the Clerk, but in our Case, the right of the cause and matter doth not appear unto us, for if Bamfeild was seised at the time of the Fine leved, then as the Demandant and his Councell pretend, the Law is with the Demandant, and if the Conuſor and not the Demandant, then the Law is with the Tenant, as his Councell hath argued, so as the right of the cause consists and depends upon the truth of the seisin, which matter doth not appear unto us: And if we enter in course of amendment,

ment, we doe not know if the Demandant would have traversed, without that, that the Conusor was seised, which shall not be a good Traverse, or absque hoc, quod partes ad finem aliquid habuerunt, &c. which although it be a good Traverse in Law, yet we do not know if the truth of the cause will serve to maintain such matter, and because without altring matter we cannot amend the Plea: Windham to the same purpose; for by the Statute of 27. Eliz. we ought to judge in this case, as the right of the cause and matter in Law shall appear; but in this case neither the right of the cause nor the matter in Law appeareth unto us, according to which we can judge, for we know not to which of the parties to give credit, touching the seisin of the Conusor, or Bamfeild at the time of the fine levied, for as to our iudiciall knowledge, both Pleas are to us equally nubious; And he argued the Cases put before touching amendment of matters upon default of the Clarke, scil. de hoc ponit se super patriam, left out, so, colour in Assize, and Trespasse wanting, so, & hoc paratus est verificare, all which matters are amendable by the Statute of 27. Eliz. But he said, that if in Trespasse the Defendant doth justify by a Lease for yeares, without shewing the place where the Lease is made, it is not amendable, for it is matter which lyeth in the notice of the party only, and not in our iudiciall knowledge: And as to the Case of 5. H. 7. 1. of the places left, he conceived it is not amendable in another Term by this Statute, for that is materiall, and the filling of those spaces the parties themselves shall supply and not the Court, for the Court shall never amend, where their amendment makes alteration of the substance of the pleading, or of the Verdict, as 20 H. 6. 15. In Trespasse, the Plaintiff declared of a continuando usque diem impetrationis brevis, viz. 18. die Martii, where the Verdict of the Jury was, 2. die Januarii, the Defendant pleaded to Issue, which was found for the Plaintiff, and that Disposition of the Verdict or date of the Verdict could not be amended. And no amendment upon this Statute of 27. Eliz. two things are to be considered.

First, that the Judges, in such amendment, medle not with matter, nor alter the substance.

Secondly, that they doe not amend but according to their iudiciall knowledge.

Anderson, to the same intent, for as it hath been said before, the truth of the Case doth not appeare unto us according to which we can judge, and I conceive that upon any amendment upon this Statute, we cannot take out one Roll and put in another, and as our case is we cannot amend this defect without taking out the whole Roll, and therefore in the Case of Leonard, which was late Custos brevium here, where in a Replevin he avowed for a Kent service, and upon speciall Verdict the Case was, that Sir Henry Illey held of the said Leonard by fealty, and the Kent mentioned in the Avowry, and was attained of high Treason, and the King seised and granted the Land to the Plaintiff, upon whom Leonard avowed for the Kent service, and I and my companions were agreed, that the rent, notwithstanding the seisure and grant of the King remained distrainable of common right, but Leonard could not have returns of the Cattell, because he had avowed for a Kent service, and now it appeareth to us upon the Verdict, that he had right to so much rent, but not to such a Kent, but a Kent-seck distrainable of common right, so a Kent in another degree; and we also argued, that the Avowry was not amendable, for then upon such amendment, we ought to take out a whole Roll, which was not intended by this Statute: And he conceived also, that in debt against Creditors in the Debet & detinet, such a Verdict shall not be amended by this Statute, and he conceived, that his exception to the Bar, quo ad medietatem, 60. Messuag. &c. parcell. medietatis, &c. is relieved by this Statute, for the meaning appeareth: And also the exception, that it is not expressly shewed that the fine was engrossed in the same Term in which it was levied. And

Periam moved another matter; if now the parties demurring in Law as to part of the Land in demand, and being at Issue upon the residue, if the Court shall adjudge the matter in Law, before the Issue be tryed, or not, 32. H. 6. 5. & 6. In Trespasse for taking of his Cattell, the Defendant as to parcell pleaded not guilty, and as to the remnant pleaded another Plea, upon which the parties did demur, and there they proceeded to tryall before the matter in Law determined, and found for the Plaintiff, and he had Judgement there, upon for the damages, but the rolls were suspended untill, &c. And the Defendant brought his Writ of Error, 48 E. 3. 15. In an Action of Waste, as to parcell the Defendant pleads, no Waste, and as to the rest pleaded matter in Law, upon which there was a demurrer joyned; It was holden, that the Issue should not be tryed untill the matter in Law be determined: But it was said by Fulthorpe in Trespasse, if the Defendant to parcell plead to Enquest, and to other parcell matter in Law, in such case he should proceed to tryall presently, and damages should be taxed of the whole, as well of that upon which there was a demurrer in Law, as of that of which the Issue was joyned, ad quod non fuit responsum, see also 11 H. 4. 228. In Trespasse, the Defendant pleaded to Issue for part, and for the residue did demur in Law. Proccesse for the tryall issued before the matter in Law determined; And Periam conceived that the Court might proceed in such Case, the one way or the other: As to the matter in Law, whether the issue in tail upon this Fine should have the Averment, he conceived, that he should not have the said Averment for that it should be very perillous to the Inheritances of the Subjects. And he argued much upon the dignity of Fines out of Bracton and Glanvil, whom he called Acores, non Authores Legis; and that Fines, at the common Law, were of great authority untill the Statute of West. 2. And afterwards by the Statute of 34 E. 3. of non-claime, from whence they became to be of so little value in Law, that they were accounted no other then Feoffments upon Record, so as thereby no assurance was of Inheritances but a generall incertainty untill the Statute of 4 H. 7. by which Statute they were restored to their ancient power and virtue: After which Statute many Shifts were devised, to creep out of it: So as the Statute of 32 H. 8. was made to take away all questions and ambiguities which were conceived upon the said Statute of 4 H. 7. And therefore we who are Judges ought to frame our Judgements for the maintaining of the authority of Fines, for so the possessions and inheritances of the Subjects shall be preferred; And that is the reason, that if a stranger levy a Fine of my Land in my name, that I have not any remedy but a Writ of Deceit against him who levyes the Fine, so if a feme covert levyeth a Fine of her Land as a feme sole, the same shall bind her after the coverture, if the Husband do not enter upon the Conusee during the coverture and interrupt the possession gained by the Fine: And 17 E. 3. and our Books are very plentifull to this purpose that the Law doth agree admit of such allegations against such Fines: A Fine was pleaded in Bar of Land in A, B, and C, he against whom it was pleaded, was not received to aver against the supposal of the Fine, that there was no such Town or Hamlet as A, 46 E. 3. 5. A woman Tenant in tail, had Issue a Daughter, who was inheritable to the tail, the Daughter took a Husband, and they both living, the Mother, and during her seisin, levyed a Fine of the Land entailed to a stranger, sur consans de droit, come ceo, &c. who rendered the Land to the Husband and Wife in speciall taile, the Husband dyed having Issue, the Wife took another Husband, had Issue, and dyed, the Husband to entitle himselfe to the Land as Tenant by the curtesie, would in pleading have averred the seisin of the Mother at the time of the Fine levied, and he could not, and yet he was a stranger to the Fine, but he was privy to the estate, and his claime was by her who levied the Fine, 6 E. 3. 46. Fitz. Averment 40. In a Writ of Entry, for disseisin, the Fine of the Ance.

Ancestor of the Demandant was pleaded in Bar by the name of W, the Demandant in a voydance of it would have said that the name of his father was R, to have avoided the fine, but to that he was not received: And 3 E. 3. 32. scil. A verment, 42. In a Formdon, the Tenant pleaded Ne dona pas, the Demandant by Replication said, That a fine was levied of the same Lands, between the father of the Demandant, and one T, by which fine the father of the Demandant did acknowledge to T the Lands, come ceo, &c. and the said T gave by the said fine to the father of the Demandant the Land in tail. Where it is said by Stone, that since the gift is proved by as high a Record, a man shall not aver against such matter in a voydance of the said fine, &c. and yet the party against whom it was a stranger to the fine; And see 38 E. 3. 7. The Lord shall not be received against a fine levied by his Tenant to aver the dying seised of his Tenant in his Homage. And as to the Issue in tail, he conceived, that the A verment doth not lye for him, for the Issue in tail is as much party, as the Heir of a Tenant in fee-simple. And see 33 E. 3. scil. Estoppel 280. In a Formdon, the Tenant toucheth the Demandant Counter-pleaded, that the Toucher nor any of his Ancestors had any thing in the Land in demand after the seisin, &c. to which the Tenant said, that to that the Demandant should not be received, for the father of the Demandant after the gift levied a fine to the Ancestor of the Toucher of the said Land in demand, sur conusans de droit come ceo, &c. and the same was holden a good bar to the Counter-plea.

And it was said by the Justices, That although the Statute of West. 2. of Donis conditionalibus, doth not avoid the fine as to the for-closing of the Issue in tail of his Formdon, yet it remaineth in force as to the restraining of the heir in tail to aver a thing against the fine as well as against the heir in fee-simple, and in all Cases, where he against whom a fine is pleaded claims by him who leveth the fine, he shall not have the same A verment, but where he claims by a stranger to the fine, there he shall have it well enough, see 33 H. 6. 18. If my father Tenant in tail, or in fee, grant the Land by fine, and afterwards I make Title to the same Land by the same Ancestor, and the fine is pleaded against me, I shall not be received to say that those who were parties to the fine had not any thing at the time of the finelvyed, but such a one an stranger whose estate, &c. but it is a good Plea for me to say, that after the fine such a one was seised in fee, and did enfeof me, vi. 22. E. 3. 17. before 33 E. 3. Estoppel 280. And Dyer 16. Eliz. 334. The father is Tenant for life, the Remainder in fee to his Son and Heir, leveth a fine to a stranger, sur conusans de droit come ceo, &c. with warranty, and takes back an estate by the same fine, in that Case it was holden that the heir should not be received to aver continuance of the possession and seisin, either ante finem, tempore finis, or post finem, in the Tenant for life, for it is a feoffment upon Record, and makes a discontinuance of the Remainder and Reversion; The only Book in our Law to maintain the A verment is 12 E. 4. 15. by Brian, who although he was a reverend Judge in his time, yet he erred in this, that if Tenant in tail be disseised, and leveth a fine unto a stranger, sur conusans de droit, come ceo, &c. that the Issue in tail may well say, that partes ad finem nihil habuerunt, but Choke and Little. were clear of a contrary opinion, and see in the same yeare, fol. 12. by Fairfax and Little on, that if Tenant in tail where the Remainder is over to a stranger, leveth a fine sur conusans de droit, come ceo, &c. he in the Remainder may aver continuance of seisin against that fine, for he is not party, nor heir to the party, &c. And the Stat. of 4 H. 7. goes strongly to extort such A verment out of the mouth of the Issue in tail, for the words concerning the same point are, saving to every person or persons, not party, nor party to the said fine, their exception to avoid the said fine, by that, that those which were parties to the said fine nor any of them had ought in the Land at the time of the said fine.

leaved. And it is clear, that the Issue in tail is privy to his Ancestor, whose heir to the tail he is, which see agreed, 19 H. 8. 6. 7. And he vouched the Case of one Stamford late adjudged, Land was given to the eldest Son in tail, the remainder to the father in tail, the eldest Son leaved a fine, sur. Consanguine de droit come ced, Acco and dyed without Issue in the life of his father, and afterwards the father dyed; the second Son shall inherit, but if the eldest Son had survived the father, and afterwards dyed without Issue, the second Son should have been barred.

Periam to the same intent: It should be very dangerous to the Inheritances of the Subjects to admit of such Averments, and by such meanes fines which should be of great force and effect should be much weakened, and he put many Cases to the same purpose as were put before by Rhodes Justice, and he shewed how that fines, and the power of them were much weakened, by the Statute of non-claim, whereof followed (as the preface of the Statute of 4 H. 7. observeth) the Universal trouble of the Kings Subjects, and therefore by the said Statute of 4 H. 7. fines, for the good and safety of the Subjects were restored to their former Chancery and authority, which should be considered by us who are Judges, strongly and liberally for the quiet and establishment of present possessions, and for the barring and extinguishing of former rights, and so did the Judges our Predecessors; which see in the Argument of the said Case between Stowell and the Lord Zouch: So see such liberrall construction, 19. Eliz. Dyer 351. Where if Land be given to Husband and Wife in speciall tail, and the Husband alone leaveth a fine and dyeth having Issue, the Issue is barred: And it hath lately been adjudged by the advice of all the Judges of England, upon the Statute of 1. Ma. Viz. All fines leaved, whereupon Proclamations shall not be dayly made by reason of Adjournment of any Terme shall be of as good force and strength to all intents and purposes, as if such Terme had been holden and kept from the beginning to the end thereof, and not adjourned, and the Proclamations shall be made in the following Terme, which reason in construction of the said Statute, the Judges in the case of the Cookes of London, 20. Eliz. have observed, which see Plowden 538. For although Successors are not mentioned in the said Statute of 4 H. 7. but only Heires, yet the Judges did construe the said Statute to extend to them that they should be bounden as well as the Heires; for it is in the like mischief, and the said Statute was made for the publick good, and for the repose of the Inheritances of the Subjects of this Realme, and therefore the same ought to be largely extended in the meaning & sense of it, and for the benefit of the Possessors of the Lands, and to the destroying of former rights which were not claimed; It hath been said, that this fine is but a fine by conclusion, and not in verity; and therefore not within the Statute. But without question, fines by conclusion are within the Statute. And that is clear by the Savant, scil. to all persons other then parties to the said fines, &c. And Periam was against the opinion in Stowells Case by Sanders 356. A Disseisor makes a feoffment in fee upon condition, the feoffee leaves a fine with Proclamation, five years passe, the condition is broken, the Disseisor re-entred, and Periam conceived that in such Case the Disseisor is bounden, for by the fine, and five years non-claim, the right of every stranger is barred, and when the Disseisor entred for the condition broken, the fine is not annoyed, but rather confirmed, and former rights shall not be revived. Windham to the same intent, and vouched the Bookes before remembred, and that the meaning of the Statute of 32 H. 8. made upon the Statute of 4 H. 7. was to bind the Issue in tail as strongly as the heir of Tenant in fee simple was bound at the common Law, and that fines by conclusion are as fully within the purview of that Statute as fines in verity, for fines by conclusion are Assurances; And as to the objection against our fine, that it

is not relevatus, because that partes ad finem nihil habuerunt, &c. the same is no reason, wherefore this fine should not be relevatus, for these words relevatus, to the effect shall for one of a fine are to be taken as to a fine levied, &c. as Edmund Anderson & socij suis, where all the Justices ought to be named, and so it seemed also to Periam and Anderson. But case had little resemblance to the Case where Tenant in tail makes a Lease according to the Statute of 32 H. 8. if he be not seised at the time of the demise, it is void, for the Statute speaks seised, in tail: but so are not penned the Statutes of 4 H. 7. & 31 H. 8. as 4 H. 7. a fine levied shall bind parties, & strangers, &c. and 32 H. 8. fines levied of any Lands entailed to the Conusor, or any of his Ancestors, and it is not a fine in respect of the possession which passeth by the fine, but in respect of the Concord and Agreement.

And Tenant in tail by these Statutes hath as great power to bind the right of the entail, although he cannot meddle with the possession, as the Tenant in free single at the common Law.

Anderson to the same intent, All the matter rests upon this point, if the Issue in tail be party or not, for if he be party, then clearly he is bounden. And as to that, the Issue in tail before the Statute of 32 H. 8. hath been always accounted party. See 29 H. 8. Dyer 32. Tenant in tail of the gift of the King leveyeth a fine, the same shall bind his Issue, for they are party. And he argued much upon the Cases cited by the other Justices before, and especially upon the said Case of Stowel and the Lord Zouch; how that the Issue in tail is there holden party; and that the Statute of fines ought to be taken and construed to enforce the operation of fines against former rights, and for the establishment of the present possessions and estates. And by him divers rights and persons are excepted by the said Statute, but this right in grove of possession, nor the Issue in tail, whose Ancestors being out of possession leveyeth the fine is not excepted, therefore both of them remain excluded in the Statute. And in his argument he stood much upon it, how dangerous a matter it should be, to receive such averments and allegations which go meet to in a disturbance of fines, for so every fine might fall in the mouth of Lay, Gent. which would be very inconvenient. And he concluded his Argument with this Case. Tenant in tail both discontinues, and disleiseth his land, and levieth a fine, the discontinuance before the proclamations re-enters, the proclamations are made, Tenant in tail both re-enters, and leiseth seised; against this fine his Issue shall not be remitted. See as to the averment 3 H. 8. 27. 33 H. 6. 18. 42 E. 3. 20. 8 H. 4. 8. 12 E. 4. 19. by Fairfax and Needham, and fol. 15. by Brian and Choke. And afterwards Judgment was given, that the Demandant should be barred.

Intr. Pasch. 29 Eliz. Rot. 2112. In Communi Banco.

C III. Gunerston and Hatchers Case.

Charles Duke of Suffolk was seised of three parts of the Hannoz of D, and ^{Avowry.} Poole was seised of the fourth part of the said Hannoz, and afterwards the Duke granted out of the said three parts a Kent charge of five marks to Gunerston; and afterwards the said Duke of the said three parts did enfeoffe Hatcher in fee, after which Poole conveyed his said fourth part of the said Hannoz to the said Hatcher in fee, and afterwards Hatcher being seised, &c. supra, reciting the said several purchases, especially the said fourth part devised to Katherine Hatcher at Will. and Gunerston distrained the Cattel of Katherine Hatcher for the arrearages of the said Kent, and in a Replevin aſſowed the distresse: and by the opinion of the whole Court the Avowry was not maintainable, for the fourth part of the said Hannoz, which was in the possession of

Poole, was not charged with the Rent, and although all the Danno; be now in the possession of Hatcher, yet the Danno; is not so consolidated nor united by this unity of possession, but that the owner might wel enough single out, eandem quartam partem, and grant it, and the grantee shall hold the same discharged, as the said Poole held it; and the beasts of the said Kacherin shall not be restrained, and so Judgment was given against the Adowant.

CIV. Mich. 29 and 30. Eliz. in Communi Banco.

Voucher.

It was moved by Serjeant Walmesley, If a common Recovery be to passe at the Barre, and the Tenant is ready at the Barre and voucheth to warr. A, for whom one is ready at the Barre to appeare for the vouchee by his warrant of Attorny; It was holden, that this appearance is meerly void, for in such case the vouchee ought to appear in person, because without summons, but where summons issueth, and the same is entred upon the Roll, there may the vouchee at the Return appear in person, or by Attorny at his Election. And that was the clear opinion of all the Justices, and also of the Preignothories.

Mich. 29. and 30. Eliz. in Communi Banco.

C V. Keys and Steds Case.

Formdon.

If a Formdon by Keys against Sted, the Case was, that Stedd and his Wife were Tenants for life, the Remainder over to a stranger in Fee; and the Writ of Formdon brought against Sted only, who made default after default, whereupon came his Wife and prayed to be received to defend her right; which was denyed her by the Court, for this Recovery doth not bind her, and it is to no purpose for her to defend her right in that Action which cannot here be impeached; Whereupon he in the Remainder came and prayed to be received, and the Court at first doubted of the Receit, forasmuch as if the Demandant shall have Judgment to recover; he in the Remainder might falsifie the Recovery, because his estate, upon which he prayeth to be received, doth not depend upon the estate impleaded, scil. a sole estate, whereas his Remainder doth depend upon a joint estate in the Husband and Wife, not named in the Writ; But at the last, notwithstanding the said Exception, the Receit was granted. See 40 E 3. 12.

Falsifier of Recovery.

Mich. 29. and 30. Eliz. In Communi Banco.

CVI. Liveseys Case.

Writ of Right

If a Writ of Right against Thomas Livesey of the Danno; of D, & de duas paribus Custodiz Forrestr de C. the Tenant did demand the view, and he had it, and return was made, and now the Writ of Habere facias visum, was viewed by the Court, and it was, Visum Manerii & duarum partium Custodiz, &c. And it was holden by the Court not to be a sufficient view, for the Forrestr it self ought to be put in view, scil. the whole Forrestr, and not dux partes tantum, as where a Rent or Common is demanded, the Land out of which the Rent or Common is going ought to be put in view; and there a Writ of Habere facias visum de novo issued forth.

View.

Mich. 29. and 30. Eliz. In Communi Banco.

CVII. *Germys Case.*

Germys brought Debt upon a Bond against A as Executor, and the Case Debt.
was, That the Testator of A by his Will did appoint certain Lands, and
named which, should be sold by his Executors, and the moneys thereof arising
distributed amongst his Daughters when they have accomplished their ages of
one and twenty years; the Lands are sold, if the moneys thereof being in the
hands of the Executors until the full age of the Daughters shall be assets to
pay the debts of the Testator: And by the clear opinion of the whole Court, Assets.
the same shall not be assets, for that this money is limited to a special
use.

CVIII. *Mich. 29. and 30. Eliz. in Communi Banco.*

Is an Action of Debt upon an Obligation, the Defendant saith, that the
Plaintiff shall not be answered, for he is out-laind, and shewes the Out-
lainy in certain, by the name of I S of D in the County of, &c. The Plain-
tiff shewes, that at the time of the lute begun against I S, upon whom the
Out-lainy was pronounced, the said I S, now Plaintiff, was dwelling at S,
absque hoc, that he was dwelling at D: Vide 21 H. 7. 14. And it was holden
a good Replication, to avoide the Out-lainy without a Writ of Error, by An-
derson. 10 E. 4. 12. for if he were not dwelling at D then he cannot be inter-
ded the same person: See 39 H. 6. 1.

CIX. *Mich. 29. and 30. Eliz. in Communi Banco.*

It was agreed by the whole Court, and affirmed by the Provisors, that
if in Actions the Defendant be adjudged to account, and be taken by a
Capias ad computandum, and set to mainprize, pendent the Account before the
Auditors, and doth not keep his day before them, that now a Capias ad compu-
tandum de novo, shall issue forth against him.

Mich. 29. and 30. Eliz. In the Common Pleas.

CX. *Glosse and Haymans Case.*

John Glosse brought an Action of Trespasse, vi & armis, against John Hay-
man, who pleaded the general Issue, and the Jury found this special matter, Trespasse, vi
& armis, a-
That the Plaintiff was a Grocer in Ipswich, and there held a Shop of Groce-
ry, & quod illa reposuit fiduciam in the Defendant, to sell the Grocery Wares gainst a Ser-
of the Plaintiff in the said Shop: And further found, that the said Defendant vant for carry-
being in the said Shop in form aforesaid, cepit & asportavit, the said Wares, ing away his
and did convert them, &c. It was moved in Arrest of Judgement, that this Masters goods
Action, vi & armis, upon this matter doth not lie, but rather an Action upon the
Case. But the Court was clear of opinion, that the Action doth well lie,
for when the Defendant was in the Shop aforesaid, the Goods and Wares
did remain in the custody and possession of the Plaintiff her self. And the
Defendant hath not any Interest, possession, or other thing in them, and there-
fore if he entremeddle with them in any other manner, then by uttering of
them

them by sale, according to the authority to him committed, he is a Trespasser; for he hath not any authority to carry the Wares out of the Shop not sold, but all his authority is within the Shop. And Rodes put the Case of Littleton 25. If I deliver to another my Sheep, to another to manure his Land, or my Oren to plow his Land, and afterwards he kills them, I shall have an Action of Trespass against him: And afterwards Judgement was given for the Plaintiff.

Mich. 29. and 30. Eliz.

CXI. Martin and Stedds Case.

Richard Martin, Alderman of London, brought an Action upon the Case against Stedd, and declared, That whereas the Queen by her Letters Patents, dated the 27. of August, anno 24. of her Reign, had granted to the Plaintiff the Office of Master of the Mint, through all England, to exercise the said Office, secundum formam quarundam Indent. betwixt the said Queen & the said Plaintiff conficiendarum, and that in January following the said Indenture was made, by which it was agreed betwixt the said Queen and the Plaintiff, that the money, in posterum, should be made in such manner, &c. according to the true Standard; and declared, that he had duly and lawfully made all the money according to the said Standard: Yet the Defendant, machinans &c. had slanderously spoken and given out speeches in these words. He, Martin hath not made the money as good and fine as the Standard, by an half penny in the ounce, and so he hath saved four thousand pounds. It was objected against this Declaration by Walmesley Serjeant, that here the Plaintiff hath declared upon the Letters Patents, and the Office given by the Letters Patents ought to be exercised according to the Indenture, &c. And here appears upon the Declaration no Indenture, for no enrolment of such Indenture is shewed, and if it be not enrolled, then there cannot be any Indenture betwixt the Queen, &c. and then the Queen cannot have an Action upon it for want of enrolment. See 21 H 7. 21. 1 H 7. 28. and 31. 5 E 4. 7. and also if there be not a sufficient Indenture, then the Plaintiff is not Master of the Mint, and then also there is not any new Indenture: And then the Plaintiff ought to make the money according to the old Standard, and then might the Defendant well justify the words.

Another Exception was taken, because the Plaintiff is not at any damage, for the Queen cannot have against him but an Action of Covenant upon the said Indenture, because the Defendant hath not made the money accordingly, which matter is not actionable, no more then if the Farmer of the Queen had brought this Action against one, for speaking that he had broken the condition or covenants of his Lease. And as unto these words, So that the Defendant hath saved four thousand pounds, those words are not actionable, for it may be he hath saved this four thousand pounds to the Queen; and such construction the Judges ought to make of such ambiguous words in such cases, scilicet in optimam partem. It was adjourned.

Mich. 29. and 30. Eliz. in the Common Pleas.

CXII. Mounson and West's Case.

Challenge.

If an Action of Trespass between Mounson and West, the parties were at Issue, and now at the Return of the Warrant the Defendant challenged the Array, because it was made by Bartholomew Armin, who took to himself the

Cosin

Tosen German of the Plaintiff, & ex ea, had Issue living, the mother being dead: And upon this challenge the Plaintiff did demurre in Law; And it seemed to the Lord Anderson, that it is not a principal challenge, but only to favour. For the matter of the challenge is not consanguinity, but only affinity: And so it seemed to Periam. And Rhodes cited a case adjudged in the Kings Bench. Markham brought an Action upon the Case against Lee, who at the Nisi Prius challenged the Array, because the Sheriffs wife was sister to the Plaintiffs wife, and that was before the Lord Dyer at Nottingham, and that challenge was holden there, not to be a principal challenge; upon which Error was brought in the Kings Bench: And Error assigned in that, and for that cause the Judgment was reversed: And by Windham the Wit of Venire facias is, quia nulla affinitate, &c. so as affinity is presumed in Law not indifferent. And by Anderson that is to be intended of the Jurors, and not of the Sheriff. 22 E 4. 2. The Array was challenged, because that the Sheriff, &c. had married a Daughter of Eliz. Sister of the Mother of the Plaintiff, and that was holden a principal challenge 10 H 7. 7. 26 E 3. 21. And afterwards at another Term the Case being moved, Anderson, Rhodes and Windham were clear of opinion, that it is a principal challenge, but Periam hestitavit, and put a difference betwixt consanguinity and Affinity, for affinity is not a principal challenge unlesse it be averred, that the Issue, &c. is inheritable to the Land. And Anderson, put the Case in 14 H 7. 2. Where one challenged, because one of the Jurors had married the Mother of the Defendant, it was holden a principal challenge. And 15 H 7. 9. where the challenge was for that the Brother of the wife of the Defendant had married the Daughter of the Sheriff.

Mich. 29. and 30. Eliz. in the Exchequer.

CXIII. Sir Thomas Greshams Case.

Sir Tho. Gresham being seised of the Mannors of Walsingham and Milham in the County of Norfolk, 12 Eliz. enfeoffed B and C to certain uses, and that was with clause of Revocation upon the tender of forty Shillings, and that after such Revocation he might limit new uses; and afterwards the year following, Sir Tho. Gresham made the like conveyance of his Lands in the County of Suffolk to the said persons, to the like uses, upon like clause of Revocation upon the tender of forty Shillings, Sir Thomas tendered to the said feoffees one sum of forty Shillings to revoke the uses raised upon both the feoffments; and afterwards raised divers uses of divers of the said Mannors holden in Capite; and afterwards Sir Thomas died: And afterwards it was resolved by the opinion of the Justices, that by that tender the uses were not revoked, but that the Revocation was utterly void, for two several sums of forty Shillings ought to have been tendered, for they were several indentures and could not be satisfied by one sum. After which by a private Act of Parliament, 23. Eliz. the said Revocation was enacted and adjudged to be good and sufficient in Law. And now the Lady Gresham was called by proccesse into the Exchequer for a Fine due to the Queen for the said alienation, because that now the said uses newly raised were good, and the said Mannor possessed according to the limitation of them, for now the Revocation is good, because done by the said Statute which recited the whole special matter, and that for want of a sufficient Tender, the Revocation was void in Law, and also reciting, the new uses which were declared for the payment of his debts, and many honorable Legacies, and also for the security of those who had purchased underneath the said new uses: For remedy whereof it was enacted, & quod prædict. Revocationes bonæ & sufficientes in lege habeantur, reputentur, & recognoscantur. And

Revocation of
uses.

Fine for Alienation.

it was argued by Coke, that upon the matter, no fine is due, for all those new uses took their essence and effect by that Act of Parliament, to which the Queen her self is a party, and the principal Agent, and therefore against her own Act she shall not claim a fine, &c. And also the alienation without licence is a wrong and trespass; and an Act of Parliament cannot do wrong, and if partition be made betwixt Parceners by Act of Parliament, no fine is due to the Queen, which was in ure, 23. Eliz. for by Parliament then a Partition was made betwixt the Co-heires of the Lord Latimer, and I do not know that any fine hath been demanded for it.

Mich. 29. and 30. Eliz. in the Common Pleas.

CXIV. *Bret and Sheppards Case.*

Debt.

Bret brought Debt upon a Bond against Sheppard, the Bond was endozed, upon condition, that where the Defendant was arrested at the sute of one A, if now the Defendant shall appear in the Kings Bench, where the proesse is returnable, that then, &c. And the Defendant sayd in fact, that he had appeared, secundum formam & effectum conditionis supra dict. & hoc petit quod inquiratur per patriam, & prædict. Brett similiter: It was moved, that the parties should replead for this matter, upon which they are at Issue, scil. the appearance is not touchable by Jury, but by the Record: And the Court was clear of opinion, that the parties should replead for the cause aforesaid: And it was moved by the Lord Anderson, that if A be bound to appear in the Kings Bench at such day, and A at the said day goes to the Court, but there no proesse is returned, then the party may go to one of the cheif Clerks of the Court, and pray him to take a Note of his appearance: And by Nelson, we have an ancient form of entry of such appearances in such Cases. Ad hunc diem venit I S, & propter indemnitate suam & Mancaporum suorum petit quod comparantia sua in Curia hic recordetur. And see for the same 38 H 6. 17. And afterwards the Lord Anderson, inspecto Rotulo, ex assensu sociorum awarded a Repleader: And so by Nelson, it hath been done oftentimes here before, and put in ure: The same Law is, where at the day of appearance no Court is holden, or the Justices do not come, &c. he who was bound to appear, ought to have an Appearance recorded in such manner as it may be; and if the other party pleadeth, Nul tiel Record. it behoveth, that the Defendant have the Record ready at his peril, for this Court cannot write to the Justices of the Kings Bench, for to certifie a Record hither.

Mich. 29. and 30. Eliz. in the Common Pleas.

CXV. *Baxter and Bales Case.*

Debt not extinct by administration.

Baxter brought Debt upon a Bond as Executor of I against Bale; who pleaded that the Plaintiff after the death of the Testator was cited to appear before the Ordinary or his Commissary to prove the Will of the said I, and at the day of his appearance he made default, upon which the Ordinary committed Letters of Administration to the Defendant, by force of which he did administer, so the debt is extinct, &c. but the whole Court was clear of opinion, that the debt was not extinct, for now by the probate of the Will the administration is defeated, and although the Executor made default at the day which he had by the Citation before the Ordinary, yet thereby he is not absolutely debarred, but that he may resort to the proving of the Will whensoever he pleaseth; But if he had appeared and renounced the Executorship it had been

been otherwise; and the debt is not extind by the Administration in the mean time.

CXVII. Mich. 29. and 39. Eliz. in the Common Pleas.

In a Franchise the parties are at Issue upon a matter tryable out of the Franchise. And it was moved; if now the Record should be sent into the Common Pleas, and there tryed, and after tryal sent back into the Franchise: which Periam and Anderson utterly denyed; and by Periam, there is no reason that we should be their Ministers to try Issues joyned before them: And it is not like, where a Liberty or Franchise a Forrein Warrant is to warrant Lands, in such cases we shall determine the Warrant; but that is by a special Statute, scil. the Statute of Gloucester cap. 12. And Nelson Preig, no way said, that such an Issue was tryed here of late. Quod nota.

Mich. 29. & 30. Eliz. At Serjeants Inne.

CXVII. The Earle of Arrundell, and the Lord Dacres Case.

Philip Earle of Arrundell, and the Lord William Howard his Brother married the Daughters and Co-heirs of the late Lord Dacres: And now came Francis Lord Dacres as heire male of the said Family, and claimed the Inheritance, &c. And after long sute betwixt both parties, they submitted themselves to the award of Gilbert Lord Talbot, and of Arthur Lord Grey of Wilton, and Windham and Periam Justices; And before them at Serjeants Inne, the matter was well debated by the Councill learned on both sides, and as unto Greisock Lands, parcell of the Lands in question, the Case was. That Tenant in tail makes a Feoffment in fee unto the use of himselfe for his life, the Remainder in tail to his eldest Son, with divers Remainders over, with a Proviso, that if any of the Entailees doe any act to interrupt the Case of any entaile limited by the said Conveyance, that then the use limited to such person should cease, and goe to him who is next inheritable; And afterwards Tenant in tail dyeth, his eldest Son to whom the use in tail was first limited entreteth, and doth an Act against the said Proviso, and yet beles himselfe in and made Leases, the Lessees enter, the Lessor dyeth seised, his Heir being with in age, and in ward to the Queen; It was holden by Shuttleworth Serjeant, Yelverton, Godfrey, Owen, and Coke, who were of Councill with the Heirs generall of the Lord Dacres, that here is a Remitter, for by this Act against the Proviso, the use, and so the possession doth accrue to the eldest Son of him, to whom the use in tail was limited by the Tenant in tail: Then when the Tenant in tail after his said Feoffment holds himselfe in, this is a disseisin, for a Tenancy by sufferance cannot be after the cesser of an estate of Inheritance; But admit that he be but a Tenant at sufferance, yet when he makes Leases for yeares, the same is clearly a disseisin, and then upon the whole matter a Remitter, and although the Tenant taketh by the Statute, yet the right of the taile decending to him afterwards by the death of his father doth remit him, as if Tenant in tail maketh a Feoffment in fee to the use of himselfe for life, the Remainder in tail to his eldest Son inheritable to the first in tail, notwithstanding that the eldest Son takes his Remainder by the Statute, and so be in by force thereof, yet when by the death of his father, the right of the Entaile descendes to him; He is remitted.

Remitter.

Mich. 29. & 30. Eliz. In the common Pleas.

CXVIII. Butler and Ayres Cafe.

Dower.

Butler and his Wife brought a Writ of Dower against Thomas Ayres, some Band Heir of Bartholmew Ayre, first Husband of the said Margaret Wife of the Plaintiff, and demanded Dower of Lands in A and B, the Tenant pleaded, never seised que Dower, and the Jury found that the said Bartholmew was seised during the Coverture, de omnibus tenementis infra script. preterquam, the Tenements in (sic ut dicta Margareta dotari potuit) Exception was taken to this Verdict; because that this preterquam, &c. hath confound the Verdict, to which it was said by the Court, that the preterquam is idle, and surplusage, for it is of another thing then that which is in demand, and the seisin of the first Husband of Lands in A and B is confessed, and the (preterquam) works nothing: Another matter was objected, because here the Jury have assessed damages, as in case where the Husband dyeth seised, the which dying seised is not found by the Verdict: In which Case it was said by the Court, the Demandant might pray Judgment of the Lands; and release damages, or the Demandant may aver that the Husband dyed seised, and have a Writ to enquire of the damages, quod omnes Pregnotarii concesserant.

Mich. 29. and 30. Eliz. In the Common Pleas.

CXIX. Michell and Hydes Cafe.

Dower.

Dower by Michel and his Wife against Lawrence Hyde, who appeared upon the grand Cape; And it was because that the said Hyde in truth was but Lessee for yeares of the Land of which, &c. in which case he might plead non-tenure, if now he might wage his Law of non-summone, so as the Writ be abated: for by the wager of Law he hath taken upon him the Tenancy, and affirmed himselfe to be Tenant, 33 H. 6. 2. by Prisoir, to which it was said by Rhodes, and Windham Justices, that here the Tenant being but Lessee for yeares is not at any mischief, for if Judgement and Execution be had against him, he notwithstanding might afterwards enter upon the Demandant. Another matter was moved, That where the Writ of Dower was, de tertia parte Rectorie de D. upon that the grand Cape issued, Cape in manum nostram tertiam partem Rectorie, and the Sherifff by colour of this Writ took the Tithes severed from the nine parts, and carried them away with him: And it was agreed by the said Justices, that the same is not such a seizure as is intended by the said Writ, but the Sherifff by virtue of such Writ, ought generally to seize, but leave them there where he found them. And the Court was in opinion to commit the Sherifff to Prison for such his misdemeanors.

Mich. 29. and 30. Eliz. In the common Pleas.

CXX. Hamington and Rydears Cafe.

Debt.

Richard Haming, Executor of Isabell Haming, brought Debt upon an Obligation against Rydear, the Case was, that Kidwelly was seised, and leased for yeares to John Hamington Husband of Isabell, and afterwards John Hamington being so possessed, by his will devised, that the said Isabell should have the

the use and occupation of the said Land for all the years of the said Terme as
she should live, and remaine sole, and if she dyed or married, that then his
son should have the residue of the said Terme not expired; John dyed, Isabell ^{Devises.}
entred, to whom the said Lawr. conveyed by feoffment the said Land in fee,
in the Indenture of the said Conveyance Lawr. covenanted that the said Land
from thence should be clearly exonerated, de omnibus prioribus, barganijs titolis
juribus & omnibus alijs oneribus quibuscunque, Isabel took to Husband, the son
entred: If now the Covenant be broken was the question; it seemed to An-
derson at the first motion, that this possibility which was in the son at the
time of the feoffment, was not any of the things mentioned in the Covenant;
scil. former bargaine, title, right, or charge; But yet it was conceived by him
that the word bargaine did extend to it, for every lease for years is a contract,
and although that the Land at the time of the feoffment was not charged, yet
it was not discharged of the former contract: And by Windham, if I be bound
in a Statute Staple, and afterwards I bargain and sell my Lands, and
covenant (ut supra) here the Land is not charged, but if after the condition
contained in the defence be broken, so as the Converse extends, now the Cove-
nant is broken; And by him, the word (charge) doth extend to a possibility;
and this possibility might be extinct by Livery as all agreed, but not transla-
ted by grant, or extinguished by release as it was lately adjudged in the Case ^{Covenant}
of one Carter: At another day, it was argued by Walmesley, and he much re-
lied upon the words (clearly exonerated) utterly discharged, or altogether
exonerated, and without doubt it is a charge which may happen, and if it may
happen, then the Land is not clare exonerated: And also former bargaines, doth
extend to it, and the Terme is not extinct by the acceptance of the feoffment
aforesaid of Kidwelly, and although, that at the time of the feoffment it was
but a possibility, and no certaine interest, yet now upon the marriage of Isa-
bell, it is become an actual burthen and charge upon the Land, and he cited a
Case adjudged, 8. Eliz. A man sold of Lands grants a Rent charge to be-
gin at a day to come, before which day he bargaines and sells the Lands, and
covenants that the said Lands are discharged of all charges, in that case when
the day when the Rent ought to begin is incurred, the Covenant is clearly
broken, for the Lands were not clearly exonerated, &c. At another day the
Case was moved at the Bar: And Anderson openly in Court declared, that
he and all his companions were agreed, that the Land at the time of the fe-
offment was not discharged of all former rights, titles, and charges; and
therefore commanded, that Judgement should be entred for the Plaintiff:

Hill. 30. Eliz. in the Kings Bench.

CXXI. Howell and Trivianians Case.

Howell brought an Action upon the Case against Trivian in the Common ^{Assumpsit.}
Pleas, and declared, that he delivered certain goods to the brother of the
Defendant, who made the Defendant his Executor, and dyed, after which the
Plaintiff came to the Defendant, and spake with him concerning the said
goods, upon which communication and speech the Defendant promised the
Plaintiff, that if the Plaintiff could prove, that the said goods were delivered
to the Testator, that he would pay the value of them to the Plaintiff: And
the Declaration was in consideration, that the said goods came to the hands
of the Testator, and also afterwards the goods came to the Defendants hands,
and upon non Assumpsit pleaded, It was found for the Plaintiff, and Judge-
ment given: And afterwards Error was brought in the Kings Bench, and
Error assigned, because that the Plaintiff had not averred in his Declaration,
that he had proved the delivery of the said goods to the said Testator, for the
words of the promise are, si probare potuisset: And also it was assign

ed for Error, that here is not any consideration upon which this promise could receive any strength, for the Defendant hath not any profit or advantage there, by, scil. by the bayment of the said goods to the Brother of the Defendant; And also it is a thing before executed, and not depending upon the promise, nor the promise upon it: As the Case reported by the Lord Dyer 10. Eliz. 272. The Servant is arrested in London, and two men to whom the Master is well known, bail the said Servant, and after the Master promiseth to them for their freindship, to save them harmlesse from all costs and damages, and in an Action upon the Case brought upon that promise, the Plaintiff was barred, for here is not any consideration, for they bayed the Servant of their own head without the request of the Master, and the matter which is alleadged for consideration is executed before the Assumpsit, and the promise was not before the enlargement, and the said bayment was not at the instance, or request of the Master: And the Case of one Hudson was cited, adjudged in the Kings Bench: The Defendant in consideration that he was Administrator, and naturall Son of the Testate, and that the goods of his Father have come to his hands, promiseth to pay the debt to the Plaintiff. And in an Action upon the Case upon that promise, the Defendant pleaded he made no such promise, and it was found that no goods came to the hands of the Defendant; And it was holden, that the consideration that he was Administrator and Son to the Testator, was not of any force to maintaine the Action, and afterwards in the principall Case the Judgement was affirmed. And it was moved by Coke that Judgement should not be given against the Executors of his own goods if he had not goods of the Testator, for the charge doth not extend beyond the consideration, i.e. That the goods of the Testator came to the hands of the Defendant, but Wray Justice was of opinion, that Judgement shall be of his proper goods, as in Case of confession: Kemp Secondary, if the Action be brought upon Assumpsit of the Testator, Judgement shall be of the goods of the Testator, but of the promise of the Executor, of his owne goods; but the Originall Judgement which is now affirmed was generall.

Hill. 30. Eliz. In the Kings Bench.

CXXII. Savell and Woods Case.

The Case was; That a Parson did Libell in the spirituall Court against a Paritioner for Tythes of such Lands within his Parish, the Defendant came into the Kings Bench and surmised, and that he and all those whose estate he hath in the Lands out of which the Tythes are demanded, have used to pay every years five shillings to the Parish Clarke of the same Parish for all the Tythes out of the same place: And it was argued by Coke, that that could not be, for a Parish Clarke is not a person corporate, nor hath succession: But if he had prescribed, that they had used to pay it to the Parish Clarke to the use of the Parson, it had been good: Also he ought to shew, that the Parson ought of right to find the Parish Clarke, &c. And he cited the Case of Bushie the Parson of Pancras, who libelled in the spirituall Court for Tythes, The Defendant to have a prohibition did prescribe, that he, and all those, &c. had time out of mind, &c. used to pay to the Vicar, &c. and at last a consultation was awarded because it was tryable in the Ecclesiasticall Court for both parties as well Vicar as Parson, are spirituall Parsons, and the modus decimandi is not in question, but cui solvend. And at another day, it was agreed by the Justices, that of common right, the Parson is not tyed to find the Parish Clarke, for then he should be said the Parsons Clarke and not the Parish Clarke: But if the Parson be tyed to find such a Clarke, and such a sum hath been used to be paid to the Parish Clarke in discharge of the Parson, the same had been a good prescription, and so by way of composition, and by Clench

Wethers are to be paid to spiritual Persons, but a Parish Clerk is a Lay person: And afterwards the Court granted a Consultation.

Hill. 30. Eliz. in the Kings Bench.

CXXIII. Higham and Reynolds Case.

In an Action of Trespasse the Plaintiff declared, that the Defendant 1 Mai 128 Eliz. cut down six posts of the house of the Plaintiff at D. The Defendant doth justify, because that the Freehold of the house, 10 Aprilis 27 Eliz. was to I S, and that he by his commandment the same day and year did the Trespasse, &c. upon which the Plaintiff did venture in Law, because the Defendant did not traverse, without that that he was guilty before or after. And the opinion of Wray was, that the traverse taken was well enough, because the Freehold shall be intended to continue, &c. Vide 7 H 7. 3. But all the other three Justices were of a contrary opinion to Wray: But they all agreed, that where the Defendant doth justify, by reason of his Freehold at the day supposed in the Declaration, there the traverse (before) is good enough: And afterwards Judgement was given against the Defendant.

Hill. 30. Eliz. in the Kings Bench.

CXXIV. Kight and Footmans Case.

In Trespasse by Kight against Footman, the Case upon the pleading was, that one Margaret had issue two Sons, Richard and Thomas, and surrendered to the use of Richard for life, and afterwards to the use of Thomas in fee; they both, Thomas being within age, surrender to the use of one Robert app John in fee, who is admitted, Richard dyeth; Thomas dyeth, having issue A, who is also admitted, and enters into the Land, and if his entry be lawful, or that he be put to his plaint in the nature of a Dumfuit infra statem was the Question. And Wray was clear of opinion that it was: And if a man seised of Copyhold Land in the right of his Wife, or Tenant in tail of a Copyhold doth surrender to the use of another in fee, the same doth not make any discontinuance, but that the issue in tail and the Wife may respectively enter; and so was it holden in the Serjeants Case, when Audley, who afterwards was made Chancellor of England, was made Serjeant, and afterwards it was adjudged, that the entry of the case was lawful.

Surrender of Copyhold Land.

Mich. 29. Eliz. in the Exchequer.

CXXV. Sir Wollaston Dixies Case.

An Information was in the Exchequer against Sir Wollaston Dixie, upon the Statute of Usury: and upon not guilty pleaded: The Informer gave in evidence an Usurious contract upon a bargain of Wares: The opinion of the Court was, that the Information being exhibited for the loan of money, that the Evidence was not pursuing nor leading to the Issue. And yet the Jury against the opinion of the Court upon that evidence found the Defendant guilty. And it was moved in arrest of Judgement, that the Evidence did not maintain the Information, nor prove the Issue, ex parte Querentis, and it was said, there are three things within the Statute, i. three words,

Information upon the Statute of 13. Eliz. of Usury.

i. bargain, loane, and cheivizance, and these three are several things, and there, for, if the Information be conceived upon loane, and the Informer giveth in Evidence a corrupt bargain for cloth, as it is in this Case, the same doth not maintain the Information; So if the Information be granted upon usurious contract by way of mortgage, and giveth in Evidence an usurious loane, *ut supra*. But if the Information had been conceived generally, upon an usurious agreement, and giveth in Evidence a loane, the same is good enough, for every loan is an agreement.

Manwood, There cannot be any loane without bargain, nor any forbearing without bargain, for he contracts or bargains to do it, viz. to lend, or forbear: Bargain of forbearing is where the first day of payment is not kept and the parties have agreed for a further day for the payment, &c. And it appeareth in this Case, that it was a bargain to forbear a sum of money which should have been paid before; And the Information here is upon a bargain by way of loane, where was a bargain for forbearing. Fuller, this word (Bargain) in the Statute cannot be intended a bargain for wares or such things, and so distinct from the other two things, &c. If in Information upon loane, an usurious contract had been given in Evidence, that would not maintain the Information: And it was moved in this Case, if the time of the loane or forbearance of the money shall be accounted according to eight and twenty dayes to every moneth, or by the moneths in the Kalender, viz. January, February, &c. And it seemed to some according to the dayes as in case of the Statute of 23. Eliz. of Recusants, and others conceived contrary in both Cases. And Fuller said, That in the Case of policy of Assurance made to warrant a Ship, one was bound to warrant a Ship for twelve moneths; and the truth was, did not perish within the time of the twelve moneths being accounted according to eight and twenty dayes, but being accounted by the Kalender, as January, Feb. &c. it perished, &c. and it was said and holden, that he had not forfeited his Bond. Gent Baron. If I lend one a hundred pounds without any contract for Interest, and afterwards at the end of the year he gives me twenty pounds for the loane thereof, the same is within the Statute, for my acceptance makes the offence without any bargain or contract. And by Clarke Baron, the place where the Defendant accepted excessive Interest ought to be shewed in the Information, but not the place where the contract for the loane or forbearance was made, for the same is not needful. See the Case betwixt Scadding and Morgan, Plowd. 200. for the setting down of the place in the Declaration, where the Extortion was committed: The Information here is by way of corrupt bargain and loane. The Defendant took at Dertford such a sum, where the taking is layed, apud Dertford, but no place of the corrupt bargain or of the loane. And by Gent. If I lend Beebe for a year, and afterwards he takes further forbearance of another year beyond the rate, the same is within the Statute: but in all Cases, the place where the corrupt bargain was made ought to be certainly alledged: Manwood Baron, the Information is not good for the uncertainty of the place, where the corrupt bargain was made; and although there are many Presidents on the Informers part, it is not to purpose, for they were admitted without exception, and then they passed sub silentio, and so of no force. There are three things, or rather degrees of offences within the Statute. In usury, within the Statute, there ought to be corrupt loane, cheivizance, or shift, 1. corruption, 2. he ought to take more than one hundred pounds, 3. it ought to be for lending or forbearing. There was a Case in this Court in the time of this Queen, that the Defendant had taken more then ten pounds in the hundred pounds, but in the Information no corruption in the bargain was alledged; and therefore Judgement was given against the Informer: But in the Case at Barre corruption is set forth in fact, and therefore as to that the Information is good enough: As unto the forbearing and giving of dayes of payment the same is alledged in the Information,

mation, but not according to the Statute, for the Statute is in the disjunctive, but the Information is in the copulative; here in our Case the issue is not guilty, under which general issue all the points of the Statute are included and ought to be tried; as unto the corruption the same is not sufficiently laid, for no place is assigned where the corrupt bargain was made, ergo novisne, for it to be tried, ergo, no trial can be, ergo, no issue for it, ergo, this point of the Statute doth not come in issue, nor can it be tried upon the general issue, not guilty. Also he held, that all the Offence ought to be within the year, for if one make a corrupt bargain for this year, and ten yeares after he takes excessive usury, the same is not within the Statute to inform upon it. And in truth there is no such offence without corrupt bargain, so as he conceived, that the word (Lending) is a strange word, but where the Statute is forbearing or giving day of payment, and in the Information it is giving and forbearing in the copulative, that is good enough, for the one word enforceth the other, and is not double. Also the Information hath not shewed whole money it is, and therefore it is not good: And afterwards Judgement was given against the Informer; and a Writ of Error thereupon brought in the Exchequer Chamber. And it was argued by Popham Attorney General, that Judgement ought to have been given for the Queen and the Informer, for the shewing of the place where the corrupt bargain was made needs not to be alledged in the Information, for the offence punishable by the Statute is the receipt of excessive usury, and not the contract: And it was the Case of one Bird, 20 Eliz. where the Plaintiff shewed the place of the Receipt, and not of the contract, and yet had Judgement for the Queen, without any exception to it before Judgement, or Error after, for the contract is but inducement to the receipt, and it shall be tried where the taking was; therefore it is not necessary to shew the place of the bargain: And it was adjourned.

Mish. 30. Eliz. in the Exchequer.

CXXVI. *Saliard and Everats Case.*

THomas Saliard and Hen. Everat being Recusants convicted, and not having Recusants, paid twenty pounds for every moneth, a Commission issued forth to enquire of their goods and Lands in the County of Suffolk, to levy thereon the Debt and penalty due to the Queen. And now the Commission being returned, the parties appeared, and by their Council shewed, that some of their Lands returned in the Commission are Copyhold, and prayed as to those, *Manus Domine Regine amoveantur*, and that upon the Statute of 29 Eliz. cap. 5. concerning Recusants: viz. that upon default of payment of penalties, &c. which proccesse issued out of the Exchequer to take and seize all the goods, and two parts as well of all the Lands, Tenements and Hereditaments, Leases and Farmes of such Offender, as of all other the Lands, Tenements, and Hereditaments, liable to such seizure, or to the penalties aforesaid, by the true meaning of this Act, leaving the third part, &c. And Popham Attorney General moved, If a Recusant hath more then a third part of his Lands in Copyhold land, if this Copyhold as to the surplusage shall be liable to the penalty. Manwood cheif Baron conceived, that the Copyhold is liable in this Case by the Statute, although not directly by expresse words, yet within the intent of it, and that by reason of these words al other the lands, &c. liable to such seizure, &c. *Walmes. Serjeant*, Copyhold is not liable to a Statute Merchant or Staple, also if the Queen hath the Copyhold, how shall the Lord have the services which the Queen cannot do: Also a Copyhold is not an Hereditament within this Statute, which extends only to Hereditaments at the common Law, and not by custom: Also in Acts of Parliament which are enacted

for forfeiture of Lands, Tenements, and Hereditaments, by those words they shall not forfeit Copy-holds: Clarck Baron, this Statute was made to restrain Recusants from taking the benefit of their Livings, and Copy-holds are their Livings as well as Free-holds, and by this Statute, the Queen shall not have every estate in the Copy-hold Land, but only the taking of the profits; but the scope of the Statute was to impair the Livings of Recusants, and that by depriving of them for want of maintenance to repair to the Church.

Walmesley, If the Statute had given to the Queen to seize two parts of their livings, then the Statute had extended to Copy-holds, Manwood, when a Statute is made to transfer an estate by name of Lands, Tenements, and Hereditaments, the Copy-hold is not within such Statute, but if the Lords Signior, his Customes and Services, are not to be impeached, or taken away by such Statute, then it is otherwise; for such Statute doth not make another Tenant to the Lord; And by him Copy-holder shall pay Subsidies, and he shall be assessed according to the value of his Copy-hold as well as of his Free-hold, and in this Case, the Queen is to have the profits of the Lands only, but no estate. At another day, the case was argued for the Recusants by Snagg Serjeant, and he said, that these words Lands, Tenements, and Hereditaments are to be construed, which are such at the common Law, not by Custom: If I give to one all my Lands, Tenements, and Hereditaments in D, my Copy-holds do not passe, and Statutes which are made to take away Possessions and Hereditaments out of persons ought to be strictly taken, and not by Equity: The Statute of 13. Eliz. of Bankrupts enacts, that the Commissioners may sell the Lands and Tenements of the Bankrupts, if the Statute had not made a further provision, the Commissioners could not sell Copy-hold Lands, but there are expresse words in the Statute for that purpose, i. e. as well copy as fee: Also the Statute of 13. Eliz. cap. 4. of Auditors and Receivers of the Queen doth not extend to Copy-holds: And it should be a great prejudice to the Lords of such Copy-holds, that the Queen should have the Lands, Popham, the intention of the Law sometimes causes a liberrall construction of a Statute in a letter of it; sometimes a strict and precise exposition, and here it appeareth, that the intention of the Statute was, that the Queen should have all the goods of the offender, and two parts of the Lands, &c. Leases and Farmes, and the Recusant but the third part of all his Lands only; And therefore the Recusant is not to have any other thing but only that which is allotted to him by the Statute, and that is the third part which is all the maintenance which the Law allows him, and then if Copy-holds be not within this Statute, a Recusant who hath great possessions in Copy-holds, and hath no Free-hold should be punishable, and hath his full maintenance against the meaning of the Statute: And he said that many things are within the meaning of a Statute, which are not within the words, as Bonds, Obligations and Specialties made to Recusants, shall passe to the Queen by this Statute by force of the word, goods, according to the meaning of the Statute, and all personall things are within the Statute, &c. profits of the Lands, Advowsons, and the like; and the very scope of the Statute was to take away from Recusants all personall things whatsoever, and two parts of real things, as Leases, Farmes, Lands, Tenements, &c. with the intent that with the superfluity of their goods and possessions, they should not maintaine Jesuits, and Seminary Priests, people more dangerous then the Recusants: And by him; Lands in ancient demesne are liable to the use, penalties by the Statute, although not by expresse words; So if a Recusant hath Lands extended by him upon a Statute acknowledged unto him, that Interest is not properly a Lease, or Farme, yet it is Land within this Statute liable, &c. And if I be Tenant by Elegit, or Statute, &c. of Lands in D, not having other Lands in the said Towne, and I grant all my Lands in D, my Interest, or supra, shall passe

What Statutes extend to Copy-holds;

passe, contrary; If I have other Lands there: And I grant, that if I have
 Copehold Lands in D, and none other, and I grant all my Lands in D, Co-
 pehold Land shall not passe by such assurance; because that Copehold cannot
 passe but by surrender; If I put out a Copeholder out of his Lands, the same
 is a Disseisin, to the Lord of whom the Copehold is holden: And if I levey a
 fine of such Lands and five yeares passe; not only the Lord is bounden as to
 his freehold and Inheritance, but also the Copeholder for his possession, for
 the intent of the Statute of 4 H. 7. was to take away controverfies, & litibus
 finem imponere, and contention may be as well for Copehold as for Land at
 the common Law: He who hath a Lease for yeares to begin at a day to come,
 he who hath the freehold thereof is disseised, the Disseisor leveyeth a fine,
 five yeares passe, he who hath the freehold is bound by it, but not he who hath
 the Interest for yeares in futuro, as it hath been lately adjudged; But he said;
 That if that poynt were to be handled againe, the Law would be taken to the
 contrary, but it is clear that a Lease in possession shall be bound by such fine;
 And as unto any prejudice to the Lord it is clear, that notwithstanding that
 the Queen hath the Copehold Land, yet the Lord shall have the Rent during
 the possession of the Queen, which is the most valuable part of the services of
 the Copeholder; the Statute of 1 E. 6. of Chantries, doth extend to Cope-
 hold, by the generall wordes, Lands, Tenements, and Hereditaments, for o-
 therwise the Proviso which excepts Copeholds were not necessary: And in
 our Statute, the wordes are Lands, Tenements, and Hereditaments which
 are forceable wordes, which proves that our exposition to extend it to Cope-
 holds is proper and agreeable to the Statute, and this in the first branch of it,
 for Copehold is some Land, Tenement, or Hereditament, the clause in this
 branch of the Statute is, and also all other the Lands, Tenements, and He-
 reditaments lyable to such seisure, &c. the same is to be meant of such Lands
 which are bound with clause of revocation, of which is spoken in the former
 part of this Statute. He who departs out of the Realme against the Statute
 of 5 R. 2. shall forfeit his goods, and thereby his debts also: The King grants,
 omnia bona & catalla fellosum; Debts of Felons shall passe; Ergo Copeholds
 also, by the name of Lands, Tenements, &c. as well as debts by the name of
 goods: In our Case, the meaning of the Statute was, that the Queen should
 have two parts of the whole estate of the Recusant, be it Copehold; Ancient
 Dimesne, &c. If upon the Statute of Bankrupts, a Copehold estate be sold
 to the King, the King shall pay the Rent, but shall not doe any of the services,
 and in so much the Lord shall be prejudiced; patiatur etiam & hic, rather
 then Recusants should not be punished, and it is not a strange thing in Law,
 that the Lord of a Copeholder should be prejudiced for the offence of his Te-
 nant, as where a Copeholder is outlawed, the King shall have the profits of
 his Copehold Lands, and the Lord hath not any remedy for his Rent,

Pasch. 30. Eliz. In the Kings Bench.

CXXVII. Stebbs and Goodlacks Case.

Betwixt Stebbs and Goodlack, the Case was, the Parson of Letcome in the County of Berks, libelled in the Spirituall for Tythes, the Defendant shewed, that the custome of the Towne of Letcome is, that the Parson shall have for his Tythes the tenth Land sowed with any manner of cozne, and he shall begin his reckoning alwayes at the first Land which is next to the Church, &c. The Parson shewed that the Defendant, by fraud and covin sowed every tenth Land which belonged to the Parson, ut supra, very ill and with small quantity of cozne, and did not dunge or manure it as he did the other nine parts, by meanes whereof, whereas the other nine every of them

Fraud shall
 not avoid
 payment of
 Tythes.

yeilded eight cocks, the tenth yeilded but three cocks, and for this matter the Parson libelled in the Spirituall Court and confessed the custome, but for abusing of the custome prayed to have his Wythes in kind, the Defendant prayed a prohibition, and the Parson afterwards a consultation: And the opinion of Wray Justice was that the custome was against common reason, and so void, but if it be a good custome, then the Parson shall have the Action upon the case.

Pasch. 30. Eliz. in the Kings Bench.

CXXVIII. Rumney and Eves Case.

Copy-holder.

In Ejectione firmæ by Jane Rumney against Lucie Eve, it was holden, that if Customary Land do descend to the younger Son by custom, and he enters and leaseth it to another, who takes the profits, and after is ejected: That he shall have an Ejectione firmæ without any admittance of his lessor or presentment that he is heir. For which the Defendant shewed, that there were thirty yeares incurred betwixt the death of the Father, and the making of the Lease, so that here is supina negligentia, which shall disable his person to make any demise, quod fuit concessum. In answer of which it was said, that the Lessor at the time of the death of his Ancestor was but of the age of two yeares, and that after his full age no Court had been holden for a long time, and that at the first Court that was holden, which was of late, he prayed to be admitted, but the Steward refused to admit him; and the same was holden a good excuse of his negligence: And it was holden, that the Plaintiff ought not to shew that the Lease is warranted by the custome, but that shall come of the other side; and so it had been lately adjudged, which Wray granted: And by him, if a Copy-holder surrender in extremis to the use of himself for life, &c. If he shall be well again, the surrender shall stand, for he hath reserved an estate to himself. It was further holden in the Case, that if a Copy-holder dyeth, his Heir within age, he is not bound to come at any Court during his non-age to pray admittance, or to tender his fine: Also if the death of the Ancestor be not presented, nor proclamations made, he is not at any mischeif, although he be of full age.

Pasch. 30. Eliz. in the Kings Bench.

CXXIX. Saint-John and Petits Case.

It was covenanted betwixt Saint-John and Petie, that Saint-John should present Petie to the Church of A; and that afterwards Petie should lease the Parsonage to Saint-John, or to any other person named by him, and that the said Petie should not be absent by eighty dayes, and that he should not resign; and Petie was bound to perform those Covenants, and Petie is presented to the Benefice: Saint-John brought an Action upon the Obligation, pretending, that he could not enjoy his lease by reason of the absence of the said Parson, &c. And the Lease was made to the Curate at the nomination of Saint-John: The Parson said, that the Obligation is void by the Statute of 14 Eliz. cap. 11. See the Statute, All Leases, &c. made by any Curate shall be of no better force, then if they had been made by the beneficed Parson himself. Tanfield by 13. Eliz. 20. When a Parson leaseth to his Curate, who leaseth over. The Statute doth not make the Lease void by any absence of the Parson, but of the Curate by forty dayes. Quære. For that it seemeth, that by the Statute of 14 Eliz. the Curate cannot lease, &c.

Pasch.

Pasch. 30. Eliz. in the Kings Bench.

CXXX. Gates and Halliwels Case.

Bettwrt Gates and Halliwell the Case was, one having two Sons, devised, that his eldest Son with his Executors should take the profits of his Lands until his youngest Son should come to the age of two and twenty yeares, and that then the said youngest Son should have the Land to him and the Heires of his body: It was holden clearly by the whole Court, that the eldest Son should have fee in the interim untill the youngest Son came to the said age.

Pasch. 30. Eliz. in the Kings Bench.

CXXXI. Prowse and Caryes Case.

Prowse brought an Action upon the Case against Cary for words: That the Plaintiff did subboyn, procure, and bring in false Witnesses in such a Court at Westminster, &c. The Defendant pleaded, Not guilty: And it was found, that he did procure and brought in false Witnesses, but was acquitted of the subboyning. It was objected, That the Action doth not lie, for it may be, that the Defendant did not know that he would depose falsely: Thou art a forger of false Writings are not actionable, and so it was adjudged, for it may be understood of Letters of small importance; but that Exception was not allowed, for it shall be taken in malam partem, and cannot be spoken of any honest man.

CXXXII. *Pasch. 30. Eliz. in the Kings Bench.*

A was bounden in an Obligation to B upon condition, that if A deliver to B twenty Quarters of Corn the nine and twentieth of February next following, datum presentium, that then, &c. and the next February had but eight and twenty dayes: And it was holden, that A is not bounden to deliver the Corn, untill such a year as is Leap-year, for then February hath nine and twenty dayes, and at such nine and twentieth day he is to deliver the Corn, and the Obligation was holden good.

Pasch. 30. Eliz. in the Kings Bench.

CXXXII. Allen and Palmers Case.

The Case was, a Copy-holder did surrender his Lands to the use of a stranger for life, and afterwards to the use of the right Heires of the Copy-holder, who afterwards surrendered his Reversion to the use of a stranger in fee, and dyed, and the Tenant for life dyed, and the right Heir of Palmer the Copy-holder entred; And by Cook nothing remained in the Copy-holder upon the said surrender, but the fee is reserved to his right Heires, for if he had not made any such second surrender, his Heir should be in, not by descent but by purchase. And the common difference is, where a surrender is to the use of himself for life, and afterwards to another in tail the remainder to the right Heires of him who surrendreth, there his Heires shall have it by descent, contrary where the surrender hath not an estate for life or in tail limited to him, for there

Copy-holder
surrenders
where his heir
shall be in by
purchase.

there his Heir shall enter as a purchaser, as if such use had been limited to the right Heires of a stranger. And by him, if a Copeholder surrender to the use of his right Heires, the Land shall remain in the Lord untill the death of the Copeholder, for then his Heir is known, &c. See Dyer 99. The Husband made a Feoffment to the use of his Wife for life, and afterwards to the use of the right Heires of the body of the Husband and Wife begotten, they have issue, the Wife dyeth, the issue cannot enter in the life of his Father, for then he is not his Heir. See Dyer 7 Eliz. 237. The Husband is sole seised in Fee, and levyeth a fine of the Land to the use of himself and his Wife, and the Heires of the Husband, and they render the Land to the Countess for the life of the Husband, the remainder to B for life, the remainder to the right Heires of the Husband: The Husband dyeth, B dyeth: Now the Wife shall have the Land for the life of the Wife, for she shall not loose her estate by that tender, and this remainder to the right Heires of the Husband is void, and the Land and estate in it is in him as a Reversion, and not as a Remainder. And a man cannot tail a Remainder to his right Heires whilst he is living, unless it begin first in himself. See Br. 32 H 8. Gard. 93.

Pasch. 30. Eliz. in the Kings Bench.

CXXXIV. Pearle and Edwards Case.

Assumpsit.
Consideration

The Case was, that the Defendant had leased Lands to the Plaintiff rent being Kent for certain yeares, and after some yeares of the Term expired the Lessee in consideration that the Lessee had occupied the Land, and had paid his Kent, promised the Plaintiff to save him harmlesse against all persons, for the occupation of the Land past, and also to come: And afterwards H distrained the Cattel of the Plaintiff being upon the Lands, upon which he brought his Action. Golding, here is not a sufficient consideration, for the payment of the Kent is not any consideration, for the Lessee hath the occupation of the Land for it, and hath the profits thereof; and also the consideration is past: Cook, the occupation, which is the consideration, continues, therefore it is a good Assumpsit, as 4 E 3. A Gift in Frank-marriage after the espousals, and yet the marriage is past, but the blood continues, so here; and here the payment of the Kent is executory every year, and if the Lessee be saved for his occupation, he will pay his Kent the better. Godfrey, If a man marrieth my Daughter against my will, and afterwards in consideration of that marriage I promise him one hundred pounds, the same is no good consideration, which Clench Justice denyed. And afterwards the Plaintiff had Judgement to recover his damages.

Pasch. 30. Eliz. In the Kings Bench.

CXXXV. Wakefords Case.

Extinguishment of Copyhold by Release.

The Earl of Bedford Lord of the Mannor of B, sold the freehold Interest of a Copeholder of Inheritance unto another, so as it is now no part, but divided from the Mannor, and afterwards the Copeholder doth release to the purchaser. It was holden by the Court, that by this Release the Copehold Interest is extinguished, and utterly gone; but it was holden, that if a Copeholder be ousted, so as the Lord of the Mannor is disseised, and the Copeholder releaseth to the Disseisor nihil operatur.

Pasch:

Pasch. 30. Eliz. in the Kings Bench.

CXXXVI. *Docton and Preists case.*

IF Trespasse for breaking of his Close, it was found by special verdict, that two were Tenants in common of a house, and of a close adjoining to the house, and they being in the house make partition without deed of the house and the close, see 3 E 4. 9. 10. Partition without deed upon the Land is good enough: Vide 3 H 4 1. and it seems by 3 E 4. Partition made upon the Land amounts to a Libery: Vide 2 Eliz Dyer 179. Partition by words out of the County void, 19 H 6. 25. Betwixt Tenants in common not good without deed; 47 E 3. 22. being upon the Land it is good without deed: Two Joynt-tenants make partition by words, make partition in another County, the same is no partition, for as to that matter the common Law is not altered by the Statute, but as to compel such persons to make partition. Wray Justice conceived, that the partition here being without deed was not good, although made upon the Lands: Vide 18 Eliz. Dyer 35. And at another day Wray said, that partition by Tenants in common without deed wheresoever it is made is good, but in this case it appears, that the parties who made the partition were in the house (for they were Tenants in common of the Messuage and a close adjoining to it) and made partition, that one should have the house, and the other the close, so as they were not upon the close when they made the partition, and then it was void for the close, and if for the close then also for the house. And Judgement was given accordingly.

Pasch. 30. Eliz. in the Kings Bench.

CXXXVII. *Cook and Songats case.*

IN an Action upon the case by Cook against Songat, the Plaintiff declared, *Quod cum quidam* Lis, and controverſie had been moved betwixt the Plaintiff Lord of the Mannor, &c. and the Defendant claiming certain Lands parcel of the said Mannor, to hold it by copy, and whereas both parties submitted themselves to the Judgement and Arbitrament of 1 S Councelloz at Law, concerning the said Land, and the title of the Defendant to it: The Defendant in consideration. That the Plaintiff promised to the Defendant, that if the said 1 S should adjudge the said Copy to be good and sufficient for the title of the Defendant, that then he would suffer the Defendant to enjoy the said Land accordingly without moleſtation: The Defendant reciprocally promised the Plaintiff, that if the said 1 S should adjudge the said Copy not sufficient to maintain the title of the Defendant, that then he would deliver and surrender the poſſeſſion of the said Land to the Plaintiff without any ſute: And ſhewed further, that 1 S had awarded the said Copy utterly insufficient, &c. yet the Defendant did continue the poſſeſſion of the Land, &c. And by Godfrey, here is not any conſideration: But by Gawdy, the ſame is a good and ſufficient conſideration, becauſe it is to avoid variances and ſutes: And Judgement was given for the Plaintiff.

Pasch.

Pasch. 30. *Eliz.* in the Kings Bench.

CXXXVIII. Pawlet and Lawrence's Case.

GEORGE Pawlet brought an Action of Trespasse against one Lawrence Parson of the Church of D. for the taking of certain carts loaded with Corn, which he claimed as a portion of Tythes in the Right of his Wife; and supposed the Trespasse to be done the seven and twentieth of August, 29 *Eliz.* and upon Not guilty it was given in evidence on the Defendants part, that the Plaintiff delivered to him a Licence to be married, bearing date the eight and twentieth of August, 29 *Eliz.* and that he married the Plaintiff and his said Wife the same day, so as the Trespasse was before his title to the Tythes, And it was holden by the whole Court, that that matter did abate his Will: But it was holden, that if the Trespasse had been assigned to be committed one day after, that it had been good, but now it is apparent to the Court, that at the time of the Trespasse assigned by himself, the Plaintiff had not tythe, and therefore the Action cannot be maintained upon that evidence, for which cause the Plaintiff was Non suit.

Mich. 30. *Eliz.* in the Kings Bench.

CXXXIX. Sir John Braunches Case.

Forfeiture.

Copy-holder.

Forfeiture.

IN the Case of Sir John Braunch, it was said by Cook, that if a Copy-holder be dwelling in a Town long distant from the Mannor, a general warning within the Mannor is not sufficient, but there ought to be to the person notice of the day when the Court shall be holden, &c. For his not coming in such case cannot be called a wilful refusal: So if a man be so weak and feeble that he cannot travel without danger, so if he hath a great Office, &c. these are good causes of excuse: It was also holden, that if a Copy-holder makes default at the Court, and be there amerced, although that the amercement be not estreated, or levied, yet it is a dispensation of the forfeiture. Gawdy Justice, If the Copy-holder be impotent, the Lord may set a fine upon him, and if he will not pay the fine, then it is reason that he shall forfeit his Land. Egerton Solicitor, Warning to the person of the Copy-holder is not necessary, for then, if the Lord of a Mannor hath one Copy-holder of it dwelling in Cornwall, and another in York, &c. the Lord ought to send his Bailiff to give notice of the Court to them, which should be very inconvenient, and by him continual default at the Court doth amount to a wilful refusal. And by the whole Court, general warning within the Parish is sufficient, for if the Tenant himself be not Resident upon his Copyhold but elsewhere, his Farmer may send to him notice of the Court: And it was further given in evidence, that Sir John Braunch had by his Letter of Attorney appointed the Son of his Farmer his Attorney to do the services for him due for his said Copyhold: And it was holden that such a person so appointed, might essoine Sir John, but not do the services for him, for none can do the same but the Tenant himself.

Mich.

Mich. 30. Eliz. In the Kings Bench.

CXL. Wilkes and Persons Case.

John Wilkes and Margery his Wife, and Thomas Persons brought Trespass, Trespass. *Quare clausum fregit, herbam suam messuit, & fenum suum asportabit, ad damnum ipsius Johannis, Margeriz, & Thomæ; And exception was taken, that it was not the Day of the Waste, nor the was not damaged by it, but her Husband: Wray Justice, the Declaration is good enough, for although it be not good for the Day, yet clausum fregit & herbam messuit, makes it good: And Judgement was given for the Plaintiffs.*

Mich. 30. Eliz. In the common Pleas.

CXL I. Atkinson and Rolfe's Case.

In an Action upon the case by Atkinson against Rolfe, the Plaintiff declared, that the Defendant in consideration of the love which he bore unto his Father, did promise that if the Plaintiff would procure a discharge of a Debt of 15, which his said Father owed to the said 15, that he would save the Plaintiff harmless against the said 15; And declared further, that he had discharged the Father of the Defendant from the said Debt, and is become bounden to the said 15, in an Obligation for the payment of the said Debt, upon which Obligation the said 15 hath sued the Plaintiff, and hath recovered, and had execution accordingly, and so hath not been saved harmless, &c. It was objected, that the Declaration was not good, because the Plaintiff hath not shewed in his Declaration, that he had given notice to the Defendant of the said Obligation, or of the suits brought against him, but that was not allowed, but the Declaration was holden to be good, notwithstanding the exception. Shuttleworth, if I be bounden to make to you such an assurance as 15 shall advise, I am bound at my perill to procure notice: but if I be bounden to you to make such assurance as your Council shall advise, there notice ought to be given unto me. It was adjourned. Notice.

Mich. 30. Eliz. In the common Pleas.

CXL II. Beare and Underwoods Case.

In a Replevin it was agreed by the whole Court, that the Plaintiff cannot discontinue his sute without the pivity of the Court, for as Leonard, Custos brevium, said, the Entry is, Recordatur per curiam; And if the Plaintiff would discontinue without moving the Court, the Defendant may enter the continuance if he will; It was also holden, that where an Original is discontinued, the Defendant shall not have costs, but if the Plaintiff be non-sute the Defendant shall have costs by 32 H. 8. 16. But after a discontinuance in a Lattice, the Defendant shall have costs by the Statute of 8. Eliz. cap 2. And in this case it was agreed, that the Plaintiff may be non-sute after a Demurrer, and so he was. Discontinuance of sute in court.

Pasch. 20. Eliz. In the Kings Bench.

CXL III. Jerom against Neale and Clave.

George Jerom, and Avice his Wife brought an Action of Trespass of Assault and wounding of the Wife, and the Action was laid in Midd. and brought against Neale and Clave, who pleaded that Salisbury is an ancient City, and that within the same, there is this custome, that if any make an Assault and Battery. Assault and Battery.

Imprison not
good.

Affray, and assault any Officer of the said City, or any other person, if he upon whom such assault is made, complaine unto the Mayor of the said City, that the Mayor for the time being may send for him who made the Affray as a Justice of Peace, to make him to answer to it, and shewed further, that the said Jerom made an Affray within the said City, of which complaint being made to the Mayor, the said Mayor sent the Defendants being Constables to bring the said Jerom to him, by virtue whereof, they went to the House of the Plaintiff, and signified to him the commandment of the said Mayor, and would have brought the Plaintiff to him, and the Wife of the Plaintiff did assault them, and they molice put their hands upon the said Wife, which is the same assault, battery, and wounding, &c. upon which it was demurred in Law: Coke for the Plaintiff; This custome is not good, or reasonable: See Magna charta 29 Nullus liber homo capiatur, vel imprisonetur, &c. nisi per legale iudicium parium suorum vel per legem terræ, therefore shall not be taken or imprisoned upon a bare suggestion, and see 24 E. 3. Br. Com. 3. where a Commission issued to take all which were suspected notoriously for felonies and Trespasses, although they are not indicted, and the same was holden against the Law, and therefore it was reboked, and see the Statute of 5 E. 4. 9. 25 E. 4. 13. 28 E. 4. 13. 28 E. 3. 3. 37 E. 3. 18. & 42 E. 3. 3. 2. To be a Justice of Peace doth not lye in Prescription. For one Justice of Peace was before the Statute of 1 E. 3. and then the Commencement being known, prescription cannot be of it, 3. Admit, that the Mayor was a Justice of Peace, yet he cannot determine any thing out of the Sessions, 4. the Prescription is, that the Mayor might send for him, and doth not say within the City, and it shall be an unreasonable Prescription to say, that the Mayor might send for him in such Case, in any place within England; 5. It is not shewed, that they of Salisbury have a corporation, so as they might be enabled to prescribe, 6. The wounding is not answered, for molice injicere manus cannot be taken for a wounding, it may well answer the battery, &c. Fleetwood Recorder of London, if the Statute of Magna charta should be observed, no felon is duly handled at Newgate, and here we have not pleaded by way of Prescription, but of usage, consuetudo and usage are all one, and afterwards Judgement was given for the Plaintiffs, for the Plea in Bar was holden to be naught, because the wounding is not answered; and the Custome is too general, and also for the fourth exception.

Pasch. 36. Eliz. In the Kings Bench.

CXLIV. Sir Julius Cæsars Case.

Fleetwood came to the Bar and shewed, that Julius Cæsar Judge of the Admiralty had libelled against the Officer of the Mayor of London, Symon Nicholas, for measuring of Coales at Wiggins Key, in the Parish of Saint Dunstan in the East, and it was upon the Thames, and prayed a prohibition because such measuring of Coals had alwayes appertained to the Mayor of London; for the Statute of 28 H. 8. 15. gave Jurisdiction to the Admiralty in case of robbery and murder: And that prohibition was grounded upon the Statutes of 13. & 15. R. 2. 2 H. 4. 11. And it was said, that this measuring whereof, &c. was in the body of the County; And note, that the said Julius Cæsar, being Judge of the Admiralty had put in this Bill, ex officio iudicis, upon which it was said by Wray Justice, that it was hard that he should be both Plaintiff and Judge, and that his Jurisdiction should be tried before himselfe, and afterwards, it was moved by Egerton Solicitor, who said he had spoken with the Lord Admirall who told him that the Mayor of London used to take a fine for measurage, and had made an office of it, and that he conceived, the same is extortion, and being made upon the water, he conceived he is punishable in this Court, for by the same reason, the Mayor might take a fine for the measuring of Cozne, Cloathes, &c. Wray and

Gawdy Justice, if it be extortion in the Mayor, there is no remedy for it in the Court of Admiralty: But in the Kings Court. Gawdy; It shall be redressed here in a quo warranto.

Pasch. 30. Eliz. in the Kings Bench.

The Towne of Green in Suffex was amerced for the escape of a Felon, and the said Amercement was grounded upon an inquisition taken before the Coroner, by whom the escape was found, and it was moved for the Towne, that here is not any such escape found, for which the Towne ought to be amerced, for it is found, that he who escaped, 10. die Januarij, 30. Eliz. circa horam quartam post meridiem, with a Pitchfork mortally struck one A, which A of the said stroak dyed at eight in the Evening of the same day, and that then the other escaped, for which escape being made in the Night, the Towne by the Law ought not to be amerced, for it is not felony, untill the party dyeth, which see 1 H. 4. and Coles Case, Pasch. 23. Eliz. 401. And therefore the Towne nor any other was chargeable with the offendor before that the party was dead. Wray, it should be hard, that the Towne should be amerced upon this matter, for although the Towne in discretion might have stayed the offendor before the death of the party, yet it is not bound so to doe: And the Court took time to advise of the Case.

Amercement.

Escape.

Pasch. 30. Eliz. In the Kings Bench.

CXLVI. Jerom and Knights Case.

Joan Jerom brought an Action upon the Case in the nature of Conspiracy against one Knight, and declared, that the said Knight had maliciously caused the Plaintiff to be indicted of felony, and to be arraigned upon it, and that he was legitimo modo acquietar. &c. And the Case was, that the Defendant came into the Court where the Sessions was holden, and complained of the Plaintiff for the said felony, for which the Justices there commanded her to cause an Indictment to be drawn, &c. Coke upon the Books of 27 H. 6. 12. 35 H. 6. 14. 27 H. 8. 2. Fitz. 115. It appeareth, that if one come voluntarily into the Court and discover felonies, and it be true which he saith, or if he come in Court and draw an Indictment by the command of the Justices, or if he be bound by order of Law, to cause the party to be indicted, or to give in Evidence although he doe it falsely, yet he shall not be punished for the same in Conspiracy, or in an Action upon the Case; But if he come gratis with malice in him before, and maliciously and falsely cause the party to be indicted, so as falsity and malice are the ground of it, &c. it is otherwise, Gawdy Justice, how shall it be tryed, if he doth it with malice or not? Coke, malice may be enquired of, for malice makes the difference betwixt Murder and Manslaughter; and in such case it is to be enquired, and here he came in to doe the same without Process or coercion in Law; But if he will safely doe such office, his direct course is to come to a Justice of Peace, and to shew to him, that his goods are stolen, and that he doth suspect such a one, and then upon examination he shall be bound to come and give in Evidence against the party, &c. in such case although that his Evidence be false, yet he is not punishable: At another day, it was said by Coke in the same case, ut supra, if a man be bound to give Evidence against any person, although he give false Evidence, no Action lyeth: Also if one come into Court gratis, and discloseth a felony, and gives Evidence if no malice proceed against the party, it is not punishable, and here forethought malice is alleadged, and put in the Declaration, to which the Defendant hath pleaded not guilty; And now he is found guilty. See the Statute of Westminster, 2. Cap. 12. Si inveniatur per inquisitionem.

Conspiracy.

Upon an Ac-
quittall of
Grace, no Con-
spiracy lieth.

quod aliquis sit abbeccator per malitiam, &c. Wray Justice, it should be hard to charge one with this Action, where he hath his goods stolen from him, and therefore causeth an Indivment to be drawn against one who he suspects of it, who shall be found guilty, who should be punished for it, for many Malefactors notwithstanding that the Evidence against them be full and pregnant, in favour of life are acquitted, whereas by Law they ought to be hanged, and it is not reason, that upon such an acquittall of grace and mercy, he should have this Action, if such person had used any words of malice before the Sessions, an Action upon the case would have layen: And afterwards Judgement was given for the Plaintiff, Trin. 27. Eliz. 750. Ratford, and afterwards a Writ of Error was brought, Trin. 29. Eliz. Rot. 669. In the Original Action the Writ and Declaration were that the Defendant, malitiose intendens querentem in nomine, vita, fama, & bonis defraudare quendam Billam Indictamenti scribi fecit, & eam exhibuit, to the grand Enquest, & ibidem false deposuit omnia in ea contenta esse vera, which by Coke is full matter of conspiracy, for the drawing of an Indivment is not the office of a witness, but if it were by the commandment of the Court, or of one Justice of Peace, it should be otherwise, for there he goes by course of Justice, 21 E. 3. 17. If one conspire with another, and afterwards he procures himselfe to be one of the Indivors, his oath shall not excuse his malice before. Gawdy, if the party had taken upon him to proceed against the party upon any good presumptions, he might have pleaded it, as to say, he found the party in the house suspiciously, &c. but because he doth not plead any such matter, but generally not guilty, and the Writ and Declaration stays not answered specially, nor controlled with the Verdict, there is no reason but that the Judgement should be affirmed; And afterwards, the Judgement was affirmed, and it was said by Wray, that here the words in the Writ and Declaration are all one as the words in a Writ of conspiracy, and the Defendant hath not shewed any speciall matter to evince him to the proceedings.

Pasch. 30. Eliz. in the Kings Bench.

CXLVII. Ferrers Case.

Prescription.

Humphry Ferrers brought an Action upon the case, and declared, that he is seised of an ancient messuage in the Town of Taniworth, and that he and all his Ancestors, whose heire he is, owners of the Messuage, &c. have used time out of mind, &c. to erect Herdells, in aperta platea of Tamworth, juxta Messugium predict, every Market day, to make Penns there for Sheep, and that he, &c. have used for such penning of Sheep, there to take diverse sums of money of such persons who would Penn their Sheep there, and further declared, that the Defendant had broken and pulled down his Herdells, per quod proficuum suum inde amisit; And upon this Declaration, Godfrey did demur in Law, 1. the Plaintiff hath not shewed in his Declaration, specially where he hath used to erect his Herdells, but generally, in aperta platea, without shewing in his own Land, or in the Land of another; if in the Land of another, it is no good title, for although that those who fish in the Sea may prescribe to set Stakes on the Land adjoining to the Sea, to hange their Nets to try after they have done fishing, and that is through the whole County of Kent. 8 E. 4. for their prescription is for the common Wealth, but the same is not so here, but only for a private gain, also no prescription is good, but where some profit comes to him who prescribes for it, which see in the case of the Abbot of Buckfast, 21 E. 4. 4. 21 H. 7. 20. Also the Declaration is, that the Plaintiff hath taken, diversas denariorum summas, and see the Writ of Dunstable case,

11 H. 6. 19. 19 R. 2. Action for le Case 51. But the certainty of the sums do not appear in this Declaration, so as the reasonableness of the custome might be known, also it appeareth here upon the Declaration, that Trespasse, vi & armis, should lye and be brought, for the Declaration is, that the Defendant did break and pull down the Herdells which cannot be without express force, as 42 E. 3. 24. Trespasse upon the case against a Miller, and declared that the Plaintiff used to grind at the said Mill without Toll, and that he sent his corne to the said Mill to be grinded, and there the Defendant came and took two Bushels of his said corne; And the Writ was upon the prescription to grind sine multura, and that the Defendant, predict. querent. sine multura molere impedivit, and by Award of the Court the Plaintiff took nothing by his Writ, for he hath declared that the Defendant hath taken Toll, and therefore he ought to have a generall Writ of Trespasse; Beaumont, to the contrary; A Sparket is as well for the common Wealth as a Fishing: Also he is at the costs for providing of Herdells; and the erecting of them, so (as he hath declared) he hath taken diverse sums of money for it, and as to any sum not certaine, it is well enough, for peradventure sometimes he hath taken a penny, sometimes two pence, as the parties could agree: And as to the exception of vi & armis, the same is not materiall, for the Plaintiff doth not reple upon the pulling down of the Herdells only, but upon the losse of the money also, which he should have had if the Defendant had not broken his Herdells: And after wards Judgement was given for the Plaintiff.

Pasch. 30. Eliz. In the Kings Bench.

CXLVIII. Beverly and Bawdes Case.

Beverly brought a Writ of Error to reverse an Oustlawry pronounced against him at the suit of one Bawdes, and shewed, that he was outlawed by the name of John Beverly of Humby in the County of Lincoln Gent. And that within the said County, there are two Humbys, scil. Magna Humby, & parva Humby, and more without addition; To which it was said, of the other side, that the truth is that there are two such Townes, and that Humby Magna is known as well by the name of Humby only, as taken for the name of Humby Magna: And upon that they are at Issue: And it was moved, if the Inquest to try this Issue shall come de corpore comitatus, or from Humby magna. And by Cook, it shall be tried by an Inquest of Humby Magna; and he confessed, that if the Issue had been, No such Town; then the Inquest ought to be of the body of the County, but here is another Issue to be tried, 22 E 4. 4. In Trespasse done in Fulborn and Hinton in the County of C. The Defendant said, that there is no such Town nor Hamlet of Hinton within the same County. Judgement of the Writ. See there by Briggs the tryal shall be, de corpore comitatus. See 14 H 6. 8. Overdale and Netherdale, and none without addition, and so at Issue tried by them of the body of the County, 35 H 6. 12. And by him, wheresoever an Issue may be tried by an Inquest out of a special Writ, there it shall never be tried by the body of the County. As the case before, 22 E 4. Trespasse in two Townes A and B. The Defendant as to A pleas, there was no such Town, and as to B pleaded another plea. Now the whole Inquest shall come out of B; for the Inquest in one Town may try any thing within the same County, which see Fitz. Vifne, 27. 22 E 4. 4. And here in our case the Issue is, if Humby Magna be as well known by the name of Humby only, as by the name of Humby Magna. And therefore the same may well be tried by Inquest out of the Town of Humby Magna. But by Wray Justice, this Issue doth amount to no such Town, for the perclose of the plea is, and no Humby without addition, and the book cited out of 22 E 4. is not ruled, but

Error;

Tryal by Inquest of what County or place.

is only the opinion of Brian. And afterwards it was awarded, that the trial was well: Another matter was objected, because it is not shewed in the writ of Error, betwixt what parties the first writ did depend, so; otherwise how can the Plaintiff in the writ of Error have a Scire facias ad audiendum Errores, if none be named in the writ of Error against whom it shall issue. And Godfrey affirmed, that upon search of Presidents it was both wayes, so as it is at the pleasure of the Plaintiff to do it or not. And Kemp Secondary shewed divers Presidents to that purpose: And afterwards the Outlawry was reversed.

Pasch. 30. Eliz. In the Common Pleas.

CXLIX. Cibell and Hills Case.

Debt for a
Nomine pena.

A Lease was made of a certain House and Land rendyng Kent, and another sum, Nomine pena; and so; the Nomine pena the Lessor brought an Action of Debt: The Lessee pleaded, that the Lessor had entred into parcel of the Land demised, upon which they were at Issue, and found so; the Plaintiff: and now the Lessor brought Debt so; the Kent reserved upon the same Lease: To which the Defendant pleaded, ut supra, scil. an Entry into parcel of the Land demised: And issue was joyned upon it. And one of the Jury was challenged, and drawn, because he was one of the former Jury: And the Issue now was, whether the said Cibell the Lessor, expulit & amovit & adhuc extra tenet, the said Hills. And to prove the same, it was given in Evidence on the Defendants part, that upon the Land demised there was a Wyck-hill, and thereupon a little small cottage, and that the Lessor entred, and went to the said cottage and took some of the Wycks and untiled the said cottage: But of the other side it was said, that the Lessor had reserved to himself the Wycks and Tyles aforesaid, which in truth were there ready made at the time of the Lease made, and that he did not untile the Wyck-hill house, but that it fell by tempest, and so the Plaintiff did nothing but came upon the Land to carry away his own goods: And also he had used the said Wycks and Tyles upon the reparation of the house. And as to the Extra tenet, which is parcel of the Issue, the Lessor did not continue upon the Land, but went off it, and relinquished the possession: But as to this last point, it seemed to the Court, that it is not material if the Plaintiff continued his possession there or not, so; if once he doth any thing which amounts to an Entry, although that he depart presently, yet the possession is in him sufficient to suspend the Kent, and he shall be said, extra tenere, the Defendant the Lessee, untill he hath done an Act which doth amount to a Re-entry. And afterwards to prove a Re-entry, it was given in Evidence on the Plaintiffs part, that the Defendant put in his Cattel in the field where the Wyck-hill was, and that the Cattel did stray into the place where the Defendant had supposed that the Plaintiff had entred. And by Anderson Justice, the same is not any Re-entry to revive the Kent, because they were not put into the same place by the Lessee himself, but went there of their own accord. And such also was the opinion of Justice Periam.

Suspension of
Rent by entry
upon part of
the Land.

C L. *Pasch. 30. Eliz. in the Common Pleas.*

Tenant in tail covenanted with his Son to stand seised to the use of himself so; life, and afterwards to the use of his Son in tail, the Remainder to the right Heires of the Father: The Father levied a fine with proclamations and dyed. It was moved by Fenner, if any estate passed to the Son by the

the Covenant, for it is not a discontinuance, and so nothing passed but during his life, and all the estates which are to begin after his death are void. Anderson, the estate passeth until, &c. and he cited the case of one Pitts, where it was adjudged, that if Tenant in tail of an Abbotsdon in grosse grant the same in fee, and an Ancestor collateral releaseth with warranty and dyeth: That the same is a good Barre for ever.

Pasch. 30. Eliz. in the Common Pleas.

CL I. Staffords Case.

The case was, that the Parson of the Church of B did libel in the Ecclesiastical Court for the Tythmilk of eight Aine depasturing within such a feild within his Parish: The Defendant saith, that he and all those, &c. had used time out of mind, &c. to pay every year a certain sum of money to the Parson, &c. for the tythes of the same feild; which plea the Judges of the Ecclesiastical Court would not allow, and therefore the party had now a Prohibition and an Injunction against the Judges, Doctors, Proctors, &c. And afterwards the same Parson libelled again for the same Tythes against the same Parishoner; and in both Libels there was no difference, but that in the later Libel it was for a lesse number of Aine, and now the Parishoner upon this matter prayed an Attachment upon the Prohibition, which was granted unto him by the Court, for otherwise a Prohibition should be granted to no purpose.

Attachment
upon a Prohibition.

Pasch. 30. Eliz. in the Common Pleas.

CL II. Samford and Wards Case.

Samford brought a Ravishment of Ward against Ward, and counted, that Some A Ancestor of the Infant, whose Heir he is, was seized of certain Lands in fee, and held the same of the Bishop of Winchester in Socage, and bred his Heir within the age of fourteen years; and that the custody of the Infant did belong unto him as his prochein Amy; by force of which he seized him and was possessed, &c. The Defendant saith, that the Land was holden of him by Knights service, absque hoc, that it is holden of the Bishop of Winchester as the Plaintiff hath counted. And upon that Issue was joyned: And it was moved by Serjeant Pockering on the Plaintiffs part, that the truth of the Case was, that all the Land descended is holden in Socage, and no part in Knights service, but that part of it is holden of another in Socage: And prayed the opinion of the Court, if that matter shall trench to the Issue as the same is joyned: And the Court was of opinion, that it did not: for if all be holden in Socage, it is not material if part of it be holden of another, so as it be holden in Socage.

Ravishment
of Ward.

Pasch. 30. Eliz. in the Common Pleas.

CL III. Stampe and Hutchins Case.

The Case was, the Obligor makes his Executors and dyeth; the Executors become bounden to the Obligor for the payment of the said debt, and the Obligor doth deliver back the Obligation of the Testator to them; and afterwards another Creditor of the Testator sues the Executors, who pleaded, that they have fully administered, upon which they are at issue, and the said especial

especial matter was found by verdict. And by Shuttleworth and Walmesley : The Jury have found for the Plaintiff, and that the Defendants have not fully administered : And yet they agreed the case of 20 H 7. 2. The Executors paying to the Creditors of the Testator a Debt with their own goods, they may retain so much of the goods of the Testator ; but that case is not like to this, for here the Executors have not made any payment or satisfaction of the Debt, nor disbursed any money, &c. nor other things, but only have made an Obligation, to pay a sum of money at a day to come, before which day it may happen that the Obligation be cancelled or released ; but it may more fitly be compared to the case 27 H 8. 6. where an Executor had compounded with a Creditor of the Testator for the payment of twenty pounds for a debt of forty pounds, and had an Acquittance testifying the payment of the forty pounds, where it was holden, that the other twenty pounds is Assets. And by Rhodes, this making of an Obligation by Executors, (although the Obligation, in which the Testator was bounden, be delivered to the Executors and cancelled) is not any administration nor payment of the said debt due : So if the Executors pledge the goods for the payment of such a debt, yet they shall be accounted Assets until payment be made, which Periam denied. And Periam and all the other Justices held clearly, that if in such case the Executors make a sufficient Obligation to the Creditor of the Testator, and sufficiently discharge the Testator without fraud or covin, that they may retain the goods of the Testator for so much : and the goods retained shall not be said Assets : And this case is all one with the case 20 H 7. for here they have discharged the Testator, and the Executors do remain charged with the same to the Creditor, and it is so fully administered, as if the Executors had expressly paid the debt. And it is not like to the case of 27 H 8. cited before, for there, although they have discharged the Testator, yet they have not charged themselves, otherwise it is in the principal case ; and although they have appointed, *alteriorem diem*, for the payment of the said debt, yet the same is not material : But the Lord Anderson conceived, that if the Creditor doth deliver unto the Executors the Obligation as an Acquittance or discharge, and in consideration thereof they promise to pay the debt, the same is not any administration as to the said debt. And by some of the Serjeants, If the plea stands good to prove fully administered, then Executors in such case may make an Obligation to pay the debt forty yeares after, and so defraud the other Creditors, which is not reasonable : If a Feoffment in Fee be made upon condition to pay certain money at such a day, and at the day the Feoffees makes an Obligation to the Feoffor for the payment of it, the same is no performance of the condition. And by Periam, If the Executor be taken in Execution for the debt of the Testator, he may retain so much of the goods of the Testator amounting to the sum for which he is in Execution, & it shall not be accounted Assets in his hands. Anderson, If he to whom the Testator was indebted in twenty pounds, be indebted to the Executors in so much, and the Executor in satisfaction of the debt of the Testator, releaseth his debt, the property shall be altered presently of the whole goods in the hands of the Executors, so where the Debtor makes the Creditor his Executor. And Judgment was given for the Executors.

Pasch. 30 Eliz. in the common Pleas.

CLIV. Beares Case.

Formedon.

A Formedon in the Descender was brought by Samuel Beare, James Beare, and John Beare of Lands in Gabel-kind; and the Warranty of their Ancestor was pleaded against them in Barre, upon which they were at Issue. If

As Assets by descent. And it was found by special verdict, that Thomas, Father of the Demandants, was seised in Fee of the Lands supposed to be descended to the Demandants, being of the nature of Gavel-kind, and devised the same to the Demandants, being his Heires, by the custom, and to their Heires equally to be divided amongst them: And if the Demandants shall be accounted to be in of the Lands by descent, or devise, was the question, for if by devise, then they shall not be Assets: Anderson, Let us consider the devise by it self without the words (equally to be divided amongst them.) And I conceive, that they shall be in by the devise, for they are not Joint-Tenants, and the survivor shall have the whole, whereas if the Lands shall be holden in Law to have descended, they should be Parceners, and so as it were Tenants in common. And although the words subsequents equally amongst them to be divided makes them Tenants in common, yet that doth not amend the matter; and so also was the opinion of Windham and Rhodes Justices.

Devise of
Lands in
Gavel-kind.

Passch. 30. Eliz. in the Kings Bench.

CLV. Nash and Edwards Case.

IN an Ejectione firmæ by Nash against Edwards, it was found by special verdict, that one Dover Ancestor of the Plaintiff, whose Heir he is, being seised of certain Lands holden in Socage, devised the same by word to his three Sisters; And a stranger being present recited to the Devisor the said words of his Will, and he did affirm them. And afterwards the said stranger put the said words in writing for his own remembrance, but did not read them to the Devisor, who afterwards dyed. And it was moved, If this devise being reduced in writing, modo & forma, be good or not. Spurling conceived that not, for the Statute intends a Will in writing, but not such writing as is here without privacy or direction of the Devisor, and it is not like the case of Brown and Sackvill, 5 Ma. Dyer 37. For the Notes were written by the commandment of the Devisor, but here it doth not appear that the meaning of the Devisor was, that the devise should be put in writing: And devises in Law are favoured, as the case in the Chancery was, that Sir Richard Peahall devised certain Lands to his Wife, and the Scrivener inserted of his own head a condition, scil. (that she should be chaste) which was disallowed by the Devisor himself, for which after his death, the condition, although it was put in writing, was void. And by the whole Court the devise is void. And by Wray, if he appoint A to write his Will, and it is written by B, it is void; but if after he had written the Will if he had read it to the Devisor, and he had confirmed it, it had been a good Will, which Gawdy granted: And afterwards Judgement was given, that the Plaintiff should recover.

Devises.

Trin. 30. Eliz. Rot. 771. In the Kings Bench.

Stone and Withypolls Case.

STONE brought an Action upon the Case against Dorochy Withypoll the Executrix of W. Withypoll her Husband, and declared that where her said Husband for certaine yeards of Velvet of the value of fourteen yards, & pro diversis alijs mercimonijs, was indebted to the Plaintiff in the sum of ninety two pounds, and made the Defendant his Executrix and dyed, that after his death he came to the Defendant, and demanded of her the said debt, who gave to him such answer, forbeare me untill Michaelmas, and then I will pay it you,

or put you in sufficient security for the true payment thereof: And declared further, that at Michaelmas aforesaid, the Defendant did not pay, nor hath found any security, and shewed a request, to which the Defendant said, that the said Testator at the time of the said Contracts for the Welbets and other Wares, was within age: And upon that War the Plaintiff did demur in Law. Egerton Solicitor for the Plaintiff, as I conceive these Contracts made by the Plaintiff are not merely void, so that if an Action of Debt, or upon the Case, had been brought against the Testator himselfe, he could not have pleaded upon the matter *Nihil debet*, or *Non Assumpsit*, or *Non est factum*, but he ought to avoid the matter by speciall pleading, and therefore here it is a good consideration, & I conceive that if the Testator at his full age had assumed to pay the debt, that that promise would have bound him, & Eliz. it was the Case of the Lord Grey, his father was indebted to diverse Merchants upon simple Contracts, and byed seile of diverse Lands which descended to his Son and Heire in Fee, the Creditors demanded their debts of the Heir, who answered unto them, if my father were indebted unto you, I will pay it, and upon that promise an Action was adjudged maintainable, although the Heir by the Law was not chargeable, and also here the Defendant is to have ease, and shall avoid trouble of Sutes, for perhaps if shee had not made such promise, the Plaintiff would have sued her presently, which should be a great trouble unto her, and therefore it is a good consideration. Cooke contrary, no consideration can be good, if not, that it touch either the charge of the Plaintiff, or the benefit of the Defendant, and none of them is in our case, for the Plaintiff is not at any charge, for which the Defendant can have any benefit, for it is but the forbearance of the payment of the debt which shee was compellable to pay, and as to the suit of the Chancery, the same cannot make any good consideration, for there is not any matter in the Case, which gives cause of suit in Chancery, for they will not order a matter there which is directly against a Rule and Partime of the common Law. As if a Feme Covert be bound, &c. and the Obligee bring her into the Chancery, and if a man threaten me, that if I will not pay to him ten pounds, he will sue me in the Chancery, upon which I promise to pay it him, no Action will lye: And an Infant is not chargeable upon any contract, but for his meat, drink, and necessary Apparell, 19 E. 4. 2. And in Debt upon such necessary Contract, the Plaintiff ought to declare specially, so as the whole certainty may appear upon which the Court may judge, if the expense were necessary and convenient or not, and upon the reasonableness of the price, for otherwise, if the necessity of the thing, and reasonableness of the price doth not appear, the Chancery himselfe would not give any remedy, or recompence to the party, Wray Justice conceived, that the Action would not lye, for the contract was void, and the Infant in an Action against him upon it may plead, *Nihil debet*: And if an Infant sell goods for money and doth not deliver them, but the Tender takes them, he is a Trespassor, but if the Infant had been bounden in an Obligation with a surety, and afterwards at his full age he in consideration thereof promiseth to keep his surety harmlesse, but upon that promise an Action lyeth, for the Infant cannot plead *non est factum*, which see Mich. 28. and 29. Eliz. in the Case of one Edmunds: And afterwards it was adjudged against the Plaintiff.

Trin. 30. Eliz. Rot 842. In the Kings Bench.

CLVII. Charnock and Worsleys Case.

Charnock and his Wife brought a Writ of Error against Worsley, the Case was that the Husband and Wife, the Wife being within age loved a fine, and the Wife upon inspection was adjudged within age, and it was
moded

moved, if the Fine should be utterly reversed, or as to the Wife only, and should stand against the Husband, and by Godfrey the Book of 50 E. 3. 6. wasouched where it is said by Chandish, that where such a Fine is reversed, the Plaintiff shall not have execution till after the death of the Husband; and by Coke and Atkinson, a Fine acknowledged by the Husband and Wife, is not like to a Feoffment made by them, for in case of Feoffment something passeth from the Husband, but in case of a Fine all passeth out of the Wife, and the Consee is in by her only, and Atkinson shewed a Precedent in 2 H. 4. where the Fine was reversed for the whole, and also another President, P. b. H. 8. Rot. 26. A Fine lewyed betwixt Richard Elie Plaintiff, and N. Ford, and Jane his Wife Deforcants, the Wife being within age, and Judgment was given, quod finis predict. aduulatur, & pro nullo penitus habeatur, and that the Husband and wife should be restored, and thereupon a Writ issued to the Custos Brevium, to bring into Court the Foot of the Fine, and it was presently cancelled in Court, Wray, this is a strong precedent, and we will not varie from it, if other Presidents are not contrary. Gawdy (who was the same day made Justice) the Fine cannot be reversed as to one, and stand as to the other, and resembled it to the Case of Littleton 150. where Land is given to Husband and Wife in taile before coverture, and the Husband aliens, and takes back an estate to him and his Wife for their lives, they both are remitted, for the Wife cannot be remitted if the Husband be not remitted: And a Precedent was cited to the contrary, 7. Eliz. where the Case was that the Husband and Wife lewyed a Fine, the Husband dyed, the Wife being within age the Wife took another Husband, and they brought a Writ of Error, and the Wife by inspection adjudged within age, and the Fine was reversed as to the Wife and her Heirs: And it was argued by Golding, that here the Writ of Error ought to abate, for the Writ is too generall, whereas it ought to be speciall, Ex querela A. B. nobis humillime supplicantis accepimus, &c. See the Book of Entries 278. Also the purchase of the Writ is, ad damnum ipsorum, the Husband and the Wife, whereas the Wife only hath lost by it, and as to the Fine it selfe, he conceived, that it should be reversed but as to the Wife, as if a man of full age, and a man within age, lewy a Fine, in a Writ of Error brought, the Fine shall be reversed, as to the Infant only, and shall stand against the other, and he cited the Case of the Lord Mountjoy, 14. Eliz. where a man seised in the right of his Wife acknowledged a Statute, and afterwards he and his Wife lewyed a Fine, and he said that during the life of the Husband, the Consee of the Fine should hold the Land charged with the Statute: Also in the Precedent of 2 H. 4. the Judgement is, that propter hunc & alios errores, the Fine should be reversed, and I conceive that another Error was in the said Writ, for which the Fine might be reversed in all, viz. the Fine was lewyed of two parts of the Pannoz of D. without saying in tres partes dividend. And see that where two parts are demanded in a Writ, the Writ shall say so, Breif 244. Coke contrary, and as to the last matter I confesse the Law is so in a Writ, but not in a Fine, for the same is but a Conveyance, for if I be seised of a Pannoz, and I grant to you two parts of the said Pannoz, it is clear, it shall be intended in three parts to be divided, And as to the principall matter I conceive, when the Fine is lewyed by the Husband and Wife, it shall be intended that the Land whereof, &c. is the Inheritance of the Wife, if the contrary be not shewed, and therefore if the party will have an especiall Reversall, he ought to shew the speciall matter, as in Englishes Case: A Fine was lewyed by Tenant for life, and he in the reversion being within age, bringeth a Writ of Error, now the Fine shall be reversed as to him in the Reversion, but not as to the Tenant for life, but here it shall be intended the Inheritance of the Wife, and that the Husband hath nothing but in the right of his Wife, and therefore shee shall be restored to the whole, for nothing passeth from the Husband, but he is named with his

Fine reversed
as to one, to
stand good a-
gainst ano-
ther.

Wife only for conformity, 11 H. 7. 19. A takes to Wife an Inheretrix, who is attainted of Felony, the King shall have the Land presently, by which it appeareth that all is in the Wife, and shee shall be restored to the whole, and the Judgement shall be according to the two Presidents cited before: And as to the President cited 7. Eliz. the same is not to the purpose, for the said Husband was a Stranger to the Fine, for which it should be absurd to reverse the Fine as against him: Egerton Solicitor Generall; Presidents are not so holy, quod violari non debeant, as to be rules to other Judges, in perpetuum, and I conceive that the Fine shall be reversed as to the Wife only, for the Fine is but a Conveyance, and the Husband may lawfully convey the Land of his Wife for his life, and if the Husband alone had levied the Fine, the same had bounden the Wife during his life, if a woman Lessee for life taken to Husband him in the Reversion, and they joine in a Fine, the Wife then being within age, now in a writ of Error brought thereof, the Fine shall stand as to the Inheritance of the Husband, but shall be reversed as to the Interest of the Wife. Coke, it shall be intended here, all the Interest and estate in the Land to be in the Wife, as 20 H. 7. 1. Where the Husband and Wife are vouched, it shall be intended by reason of the Warrantie of the Wife only, and so the Counter-plea shall be of the seisin of the Wife and her Ancestors: Wray, when the Husband and Wife joine in the Fine, it shall be presumed, the Inheritance of the Wife, and if it be otherwise, it ought to be specially shewed, and as to that which hath been said, that if the Husband alone had levied a Fine, it should have bounden the Wife during the life of the Husband, the same is true, but such Fine is but a discontinuance, but the right continueth in the Wife, but when the Husband and Wife joine in the Fine, all passeth out of her, and if the Fine in such case for the Inheritance shall be reversed in all, to whom belongs the free-hold, and to whom shall be attendant: Gawdy, 12 H. 7. 1. In a Precipe quod reddat against them, they vouch feebly, the Voucher was not received, and yet they might have feebly all Causes of Voucher, but the Law presumes they are Joynt-tenants, and have a Joynt cause of Voucher, if the contrary be not shewed: And afterwards Judgement was given, quod finis predict. reversetur, and Wray said had conformed with many of the other Justices, who were of the same opinion. Gawdy, the Fine shall be reversed in all, for this is an Error in Law of the Court, F. B. 21. D. For by this Fine the Husband giveth nothing divided from the estate of the Wife, but all passeth from the Wife, and therefore all shall be reversed, and if the Fine should be reversed as to the Wife only, then the Fine levied now by the Husband alone is a discontinuance, by which the Wife by the common Law shall be put to her Cui in vita, and that is not reason, also we cannot by this Reversall, make the Conusee to have a particular estate during the life of the Wife: And therefore the Fine is to be reversed for the whole, and as void for the whole to the Conusee.

Trin. 30. Eliz. in the Kings Bench.

CLVIII. Cage and Paxlins Case.

Daniel Cage brought an Action of Trespasse against Thomas Paxlin for Trespasse done in a Close of Wood, called the Frith-Close, and in the Parke, and for taking of certain Loads of Wood: The Defendant pleaded, that the Earle of Oxford was seised of the Mannor of W. of which the place where, &c. is parcell, and leased the same to JS for yeares, excepting all Woods, great Trees, Timber-trees, and Under-woods, &c. And codenatur

Lease of
Lands except-
ing the wood

ted with the Lessee and his Assignes, that he might take Hedges, boot, and Fire-
boot, super dicta premissa, and shewed further, that the said LS assigned his
Interest unto the Defendant, and that he came to the said Close called the
Frith Close, and cut the Wood there for Fire boot, as it was lawfull for him
to doe, &c. And note, that after the Lease aforesaid, the said Earle had assu-
red the Inheritance thereof to Cage the Plaintiff. And it was argued by
Godfrey, that the Lessee cannot take Fire boot in the said Close, for the wood
&c. is excepted, and was never demised, and by the exception of the wood, the
soile thereof is excepted: See 46 E. 3. 22. A leased for life certain Lands re-
serving the great wood, by that the soile also is reserved, vi. 33 H. 8. to Re-
servation, 39. 23 H. 8. 131. And by the words of the Covenant, the intent of
the Lessor appeareth, that the Lessee shall have his Fire boot out of the resi-
due of the Lands demised, for premissa here is equivalent with premissa:
And he cited the Case moved by Mountaine cheif Justice, 4. E. 6. in Plowden,
in the Case betwixt Dye and Manningham, 66. A. leaseth unto B. a Mannor
for yeares, excepting a Close, parcell of it, rendering a Rent, and the Lessee is
bounden to performe all Grants, Covenants, and Agreements, contents &
expressa aut tectata, in the Indenture, if the Lessee disturbe the Lessor, upon
his occupation of the Close excepted, he hath forfeited his Obligation, &c.
But our Case is not like to that: And if I let the Mannor of D. for yeares, ex-
cept Green-meadow, and afterwards I covenant that the Lessee shall enjoy
the Premises, the same doth not extend to Green-meadow. Snagg Serjeant to
the contrary, and by him premissa, are not restrained to premissa, but to all
the Premises put in the former part of the Indenture of Demise, therefore
the Lessee shall have Fire boot in the one, and the other, and he put a disse-
rent betwixt all Woods excepted, and all woods growing excepted, for in
the one case the soile passeth, in the other not: And as to the Case cited before
in Plowden, 66. that's true, for exception is an Agreement: And he said that
by that exception the soile it selfe is excepted, and these woods which are na-
med by name of woods, contrary where a Close containeth part in woods, and
part in Pasture: And by the exception of Timber-trees, and other woods,
all the other woods are excepted, but not the soile: As if a man grant all his
Lands in D. Land, Meadow, Pasture, and woods thereby passeth, by excep-
tion of this Close of wood, the soile also is excepted, and he conceived, that al-
though all the woods be excepted, yet by the Covenant an Interest passeth to
the Lessee, so as he may take Fire boot without being put to his Action of Co-
venant: As 21 H. 7. 30. A. leaseth unto B. for life, and Covenants in the
Indenture of lease, that he shall be punished of Waste, although the same be
penned by way of Covenant, yet it is a good matter of War being all by one
Deed: And afterwards Judgement was given for the Plaintiff, as to that
Close of wood called Frith-Close, but as to the Parke, for the Defendant, for
the Frith-Close was all excepted, scil. the wood and the soile: And these words,
super premissa, shall be intended such things which were demised, and no o-
ther, and by this Covenant, the Lessee hath power to take the wood upon the
other Lands, although that the wood be excepted, for the soile was demised, and
he shall not be punished in Trespasse, and put to his remedy, by Action of Co-
venant against the Lessor: And by Wray, there is not any colour against the
Plaintiff for the Frith Close, if not that the Defendant had averred, that there
is not any wood upon the other Lands not excepted but demised: And this
word, Premissa, doth not extend by construction to this mentioned before, be-
ing excepted, but only to the things demised.

Trin. 30. Eliz. In the Kings Bench.

CLIX. *Rivett and Rivetts Case.*

Assumpsit.

Edmond Rivett brought an Action upon the Case against George Rivett, and declared, that where it was pretended to the Defendant, that one R made his Will, and by the same devised certain Legacies to the Defendant, and the Plaintiff upon that had sued in the Prerogative Court of Canterbury for to disprove the said Will: And if he prosecutus fuisset, he might have disproved the said Will, and so defeated the Defendant of his pretended Legacies: The Defendant in consideration that the Plaintiff, ultra non procederet, did promise to give to the Plaintiff one hundred pounds: and averred, that he had surceased his said sute; And further declared, that licet the Defendant, ad hoc requisitus fuerit tali die & anno, &c. It was moved in arrest of Judgement, that here is not any consideration, for the Defendant hath not any meanes to compell the Plaintiff for to surcease his sute, for there is not any crosse promise set forth in the Declaration; And although that he doth surcease his sute, yet he may begin the same again, and therefore the Plaintiff ought to have shewed in his Declaration a Release or other discharge of it, as the case was 3 Eliz. repeated by Bendloe. A was bound unto B in twenty pounds, and afterwards A promised to B, that in consideration the said A should not be dammified by reason of the said Bond, to give the said B ten pounds, and upon that promise B brought an Action upon the Case, and shewed, that the Defendant was not dammified by reason of the said Bond. But it was adjudged, that the Action was not maintainable upon that matter, because that the Plaintiff did not shew in his Declaration, that he had released or otherwise discharged the Defendant of the said Bond, and so no consideration in the case.

Request.

Another Exception was, because the request is not layed certainly, but generally, licet requisitus, and doth not say by whom he was required, or what thing to do: And afterwards a President was shewed, *Trinit. 28. Eliz. rot. 523. betwixt Smith and Smith.* An Assumpsit, in consideration that the Plaintiff should not implead the Defendant upon Bond: And the Plaintiff had Judgement to recover. And as to the request it was said by Kempe, that there are many Presidents, that a Request generally leyed is sufficient: And afterwards in the principal Case Judgement was given for the Plaintiff.

Trin. 30. Eliz. In the Kings Bench.

CXL. *Wheeler and Twogoods Case.*

Wheeler brought an Ejectione firmæ against Twogood, and it was found by special verdict, that the Earl of Oxford was seised of the Mannor of Hornely, in which were divers Cope-holds: And that the said Earl leased the said Mannor to one Heywood for one and twenty yeares, to begin two yeares after. Except all casualties and profits of Courts, which severally did not passe the value of six shillings eight pence. And afterwards the Earl bargained and sold the Reversion to Anthony Cage: And afterwards a composition was made betwixt Anthony Cage and the Lessee, by which the Lessee did grant and covenant to & with the said A Cage, that he would permit the said Anthony Cage peaceably to hold the Courts and to take the profits to his own use, Proviso, that the said Lessee should have the Rents of the Cope-holders and free-holders: And afterwards the Lessee granted over his Interest in the said

said Term. It was moved by Towse, that by this Exception the Court Bar-
ron is not excepted nor severed from the Mannor, nor destroyed, for it is inci-
dent to the Mannor, and this Covenant betwixt the Lessee and Anthony Cage
amounts to a grant of the Court to Anthony Cage. See 44 E 3. Fitz. Man-
hous de saics 144. and 29 E 3. Burr. 280. and see 37 H 8. and 1 E 6. Br.
Leases 60. That where I S Covenants, & concessit to I N, that he shall
have twenty acres of Land in B for one and twenty yeares, it is a good Lease,
for this word concessit is as strong as dimisit. And it was moved, that here
the Earl leased for yeares to begin two yeares after, and the Lessee being in
possession, doth continue it after the two yeares, and afterwards before any en-
try the Lessee assigns over his Interest, that the same is not a good grant, but
only a Right: But by the whole Court the grant was holden good, notwith-
standing the said Exception: And it was holden also, that the Covenant (ac-
supra) was void, for although that Anthony Cage hath authority to hold the
Courts, yet it ought to be in the name of the Lessee.

Covenant
amounts to a
grant.

Trin. 30. Eliz. in the Kings Bench.

CLXI. Stretton and Taylors Case.

Stretton did informe against Taylor upon the Statute of Usury: Qui se-
quitur tam pro Domina Regina, quam pro seipso: And the Queens Attor-
ney entred upon it, &c. non vult prosequi, and that was pleaded in Bar against
the Informer for the whole: And by Wray, the same is not any Barre to the
Informer. But Popham the Attorney general said, that by the favour of the
Court he would maintain the authority of his place, which his Predecessors
had enjoyed, for he said, it cannot be found by any Record in this Court, Com-
mon Pleas, or the Exchequer, that the Informer had proceeded where the At-
torney General had made such an Entry, for we have not used to do it without
great consideration, for if the Informer hath ceased to prosecute the Sute two
or three Termes, then we used to enter a Non vult prosequi. For it is not
reason that the Subject should be molested or attendant so long without just
cause, and it is not against Law, that in personal Suits the act of one should
prejudice the other: And the Queen is the principal party in this sute, for
the Replication shall be made in the name of the Queen only, and not of the
Informer: And afterwards by Award of the Court it was ruled, that that
Entry by the Attorney is not any Barre, quoad the Informer, so if the Queen
be Nonsuit, so the Nonsuit of the Informer is no Barre against the Queen:
And Wray said, that such was the opinions of Anderson and Gawdy Justi-
tes, &c.

Information
upon the Sta-
tute of Usury.
Retraied by the
Queens Attor-
ney shall not
bind the Infor-
mer.

*Trinit. 30. Eliz. in the Kings Bench. Intrat. Hill. 30. Eliz.
Rot. 10.*

CLXII. The Queen against Lewis, Green, and others.

A Information for the Queen against Lewis, Green, and others: The
Case was, King E 6. was seised of the Mannor of Stepneth, and twenty a-
cres of Lands in Stepneth, called Stepneth Parsh, and of another Parsh also
called Stepneth Parsh, and granted unto the Lord Wentworth and his Heires
the Mannor of Stepneth, in the County of Midd. Nec non mariscam in Stepneth,
appel. Stepneth Parsh in com. pradiat. nec non omnia terr. & ten. eidem
Manerio five premissis pertinent. And if the twenty acres, called Stepneth
Parsh, not parcel of the said Mannor passe, or not, was the Question: Cook,
that

Grants of the
King.

that they shall passe: Were this grant both consist of three parts; 1. The grant of the Mannor; 2. Nec non mariscum in Stepneth; 3. Nec non omnia, terras & tenementa dicto Manerio five pramissis pertinen. And by the second clause these twenty acres shall passe, be the same parcel or not, and the latter words cannot referre to that, for it is certainly expresse before. And the case lately agreed in the Court of Wards betwixt Bronkor and Robotham was cited, which was, That the King being seised of the Mannor of Sandridge and Newnam, parcel of the possessions of the Monastery of Saint Albans, and part of the Mannor of Newnam extended into the Parish of Sandridge, and the King granted the Mannor of Sandridge, nec non omnia, terras & tenementa sua in Sandridge, dicto nuper Monasterio pertinen. nec non omnia, terras & tenementa sua dicto Manerio de Sandridge pertinen. By which grant, although that the latter clause both restrain it to the Mannor of Sandridge, yet the general words of the second clause shall extend to make passe all the whole Mannor of Newnam, which extended into the Parish of Sandridge, and a Decree was in the said Court accordingly.

At another day the case was argued, and the case put to be thus. King E 6. was seised of the Mannor of Hackney and Stepneth in the County of Midd. within which was a great Parish, called Stepneth Parish, parcel of the Mannor of Stepneth, which the King had by exchange of the Bishop of London, and there were also twenty acres of Lands which were lying in Stepneth Parish, and were known by the name of Stepney Parish, late parcel of the possessions of the Priory of Grace, and granted unto the Lord Wentworth and his Heirs, Dominia five Maneria sua de Hackney & Stepney, nec non mariscos suos de Stepney in Stepney prædict. nec non omnia Maneria terras & tenem. & mariscos dictis Maneriis aut ceteris pramissis pertinen. If these twenty acres passe in the general words in the first Nec non, or if the words in the second Nec non (dictis Maneriis pertinen.) both restrain the generality of the first words, was the question: And by Phillips the twenty acres doe not passe, for the grant of the King shall be alwayes taken to a common intent: And because here the King hath these Parishes by several titles, that Parish only shall passe, which by general entendment shall be intended to passe, scil. the great Parish, which was in truth parcel of the Mannor of Stepney, and not the twenty acres which the King hath by a special title, although that, ex vi termini, the grant may extend unto it: Also the grant of the King shall be taken, secundum intentionem Regis, and not in deceptionem; and here it appeareth, that the intent of the King was not, that these twenty acres should passe, i. the King grants Maneria sua & terras, and all Lands, &c. iisdem pertinen. but it is not part of any thing pertinen. to those twenty acres, therefore his intent was not to passe them. Secondly, the grant is to have them as fully as the Bishop of London had them, without mentioning of the Priory. Thirdly, as fully as the Bishop had granted them to us, but the Bishop had not granted these twenty acres to the King. Fourthly, in the Letters Patents the King recites the value of the Mannor of Hackney and Stepney, but no value of the twenty acres. (Quære, what difference there is betwixt Stepney Parish, & the Parish of Stepney.) As to the first, the grant is, iisdem & ira pramissis pertinen. which word pramissis includes the premises or otherwise should be void: Secondly, the words as the Bishop had, and as ampie as we have from the Bishop are surplusage, and nihil operatur by them. And if the King had not the same of the Bishop it is not material, but they shall passe notwithstanding, because by a special name: As if the King grants to me Manerium de Dale, quod a nobis nuper concebat. Suit, and in truth it was not concealed, yet it shall passe by his special name: But if the grant had been; Proviso, that if the said Mannor were concealed, &c. the same had been good, for it is good by way of Proviso, but not by reference. As to the valuation the same is not material, for who can restrain the bounty of the King. 29 E 3. 7, and 8. The King granted omnes Advocaciones pertinen.

Grants of the
King taken
according to
his intent.

pertinend. to such a Priory, quas nuper concessimus patri, of the Patentee, although the King had not ever made such a grant, yet it is a good grant to the Sons, causa qua supra. Gawdy Justice conceived, that the twenty acres did passe, and he confessed the case betwixt Bronkor and Robotham to be good Law, for there the intention is fully, that all appertaining to the Monastery, whether it were parcel of the Mannor of Newnam or of Sandridge, passeth, 6 E 6. 8. Dyer. A man leaseth all his Meadows in A containing ten acres, whereas in truth they are twenty acres, all passeth, &c. And if the King grant the Mannor of D to A; and further saith, Damus & concedimus, so freely as I S had it, and I S never had it, yet the grant is good: And as to the misrecital of the value, the same is helped by the Statute. Clench Justice to the same intent; and the Jury hath found, that the twenty acres are parcel of Steepney Parsh. Wray to the same intent, against expresse words no favour shall be given to the King. And note, that the Parshes pertaining to the Mannor are in the third clause, ergo, the Parsh in the second clause shall be intended a Parsh in grosse, or otherwise it should be idle. And afterwards Judgement was given against the Queen.

Trin. 30. Eliz. In the Kings Bench.

CL XIII. Piers and Liversuchs Case In Ejectione

firma

It was found by special verdict, that one Robert Liversuch Grandfather of the Defendant, was Tenant in tail of certain Lands, whereof, &c. and made a Lease for yeares to one Pur. who assigned it over to P father of the Plaintiff. Robert Liversuch died: Whis Son and Heir entred upon P, who re-entred. W demised without other words the Land to the said P for life, the remainder to Joan his Wife for life, the remainder to the Son of P for life with warranty, and made a Letter of Attorney therein to enter and deliver seisin accordingly. P dyed before that the Libery was executed, and afterwards the Attorney made libery to Joan. W dyed; Ed. his Son and Heir entred upon the Wife, she re-entred, and leased to the Plaintiff, who upon an ouster brought the Action: Heale. When P entred upon W Liversuch the issue in tail, he was a disseisor, and by his death the Land descending to his Heir, the entry of W Liversuch, the issue in tail, was taken away: Cook contrary. P by his entry was not a disseisor, but at the Election of W, for when P accepted such a deed from W, it appeareth that his intent was not to enter as a disseisor; and it is not found that the said P had any Son and Heir at the time of his death, and if not, then no descent; and there is not any disseisin found that P. expulit Liversuch out of the Land. And Judgement was given against the Plaintiff. And Cook cited a Case which was adjudged in the Common Pleas, and it was the Case of Shipwich, Grandfather, Tenant in tail, Father and Son; The Grandfather dyed, the Father entred and paid the Rent to the Lessor, and dyed in possession, and adjudged; that it was not any descent, for the paying of the Rent doth explain by what title he entred, and so he shall not be a Disseisor but at the Election of another.

Trin. 30. Eliz. in the Kings Bench.

CLXIV. Severne and Clerkes Case.

Agreements.

The Case was, that A by his Deed Poll recited, That (whereas he was) possessed of certain Lands for yeares of a certain Term. He good and lawful conveyance he assigned the same to I S, with divers Covenants, Articles and Agreements in the said deed contained, which are or ought to be performed on his part. It was moved, if this recital (whereas he was) be an Article or Agreement within the meaning of the condition of the said Obligation, which was given to perform, &c. Gawdy conceived, that it is an agreement: For in such case I agree, that I am possessed of it, for every thing contained in the deed is an Agreement, and not only that which I am bound to perform: As if I recite by my deed, that I am possessed of such an interest in certain Lands, and assign it, over by the same deed, and thereby covenant to perform all Agreements in the deed, if I be not possessed of such Interest, the covenant is broken. And it was moved, if that recital be within these words of the condition (which are or ought to be performed on my part.) And some were of opinion, that it is not within those words, for that extends only in futurum, but this recital is of a thing past, or at the least present.

Recital.

Clench. Recital of it self is nothing, but being joyned and considered with the rest of the deed it is material, as here, for against this recital he cannot say that he hath not any thing in the Term. And at the length, it was clearly resolved, that if the party had not that Interest by a good and lawful conveyance the Obligation was forfeited.

Trin. 30. Eliz. in the Kings Bench.

CLXV. Page and Jourdens Case.

Trespas.

In Trespas betwixt Page and Jourden the case was: A Woman Tenant in tail took a Husband, who made a feoffment in fee and died. The Wife without any Entry made a Lease for years: It was moved, that the making of this Lease is an Entry in Law. As if A make a Lease for years of the Land of B, who enters by force of that Lease, notwithstanding the Lessor without any Entry is a Disseisor. And it was resolved, that by that Lease, that the Freehold is not reduced without an Entry.

A general entry amounts to a disseisin.

Trin. 30. Eliz. in the Kings Bench.

CLXVI. Havithlome and Harvies Case.

upon statute of cap. 9.

Havithlome brought an Action upon the Statute of 5 Eliz. cap. 9. against Harvie and his Wife for the penalty of ten pounds given by the said Statute against him who was served with process, ad testificandum, &c. and doth not appear, not having any impediment, &c. and shewed that process was served upon the Defendants Wife, and sufficient charges, having regard to her degree and the distance of the place, &c. tendered to her, and yet she did not appear. And it was found for the Plaintiff. It was moved in arrest of Judgement, that the Declaration is not good, because the Plaintiff in setting forth that he was damaged for the not appearance of the Wife according to the process, hath not shewed how damaged: Also it was moved, that a Feme

Cobert

Cobert is not within the said Statute, for no mention is made of a Feme Covert, and therefore upon the Statute of West, 2 cap. 25. If a feme Covert fall of her Retors, she shall not be holden disseisfesse, nor imprisoned. Also here the Declaration is, that the Plaintiff tendered the charges to the Wife, where he ought to have tendered the same to the Husband.

To these three Exceptions it was answered. 1. That although the party be not at all dammished, yet the penalty is forfeited. 2. Feme Coverts are within the said Statute, otherwise it should be a great mischief, for it might be that she might be the only witness: And Feme Coverts, if they had not been expressly excepted, had been within the Statute of 4 H 7. of Fines. 3. The wife ought to appear, therefore the tender ought to be to her: And afterwards Judgement was given for the Plaintiff.

Pasch. 30. Eliz. in the Kings Bench.

CLXVII. *Dellaby and Hassals Case.*

In an Action upon the Case, the Plaintiff declared that the Defendant in consideration that he had retained the Plaintiff to go from London to Paris to Merchandize diverse goods to the profit of the Defendant, promised to give to him so much as should content him, and also to give him all and every sum of money which he should expend there in his Affaires, & further declared, that he was contented to have twenty five pounds for his labour, which the Defendant refused to pay: And exception was taken to the Declaration, because there is not set down any place or time of the notification of his contentment, for the same is traversable: Gawdy, the Judge here is, non Assumpsit, and therefore that matter as out of the Book, Cook: If one assume to pay twenty pounds to another upon request, although the Defendant plead, non Assumpsit, yet if the place and time of request be not shewed, Judgement many times hath been stayed, for no Action without a Request, so here without notification of his contentment, no Action, therefore he ought to shew it: Gawdy, the ground of this Action is the Assumpsit, but that cannot be certain without Declaration, and thereof notice ought to be given to make certainty of the duty, but not to enforce the promise, but in your case, without a Request Assumpsit will not lye; But here it being but conveyance, the certainty of the time and place is not necessary to be shewed, but the generall forme shall serve, for it is but inducement: As if a man will plead a beufe of goods to him, and assent of the Executors to take them, he need not to shew the time and place of the assent. Gawdy, at another day, said that Judgement ought to be given for the Plaintiff, the Assumpsit is the ground and cause of the Action, and the shewing of the contentment is only to reduce the Action to certainty: And Judgement was given for the Plaintiff.

Trin. 30. Eliz. in the Kings Bench.

CLXVIII. *Musket and Coles Case*

William Musket brought an Action upon the Case against Cole, and declared that in consideration, that the Plaintiff had payed unto the Defendant forty shillings, for the Debt of Symon his Son, the Defendant promised to deliver to him, omnes tales billas & Obligationes, in which his Son was bounden to him; which thing he would not doe, and it was found by Verdict for the Plaintiff: And it was moved for stay of Judgement, because the Plaintiff had not averred in his Declaration, that the said Defendant had

Averment.

Bills of Obligations, in which Simon his Son was bounden to the Defendant, for if there were none, then no damage. And see Onlies Case, 19 Eliz. Dyer 356. D. in consideration that the Plaintiff had expended divers sums of money circa the businesses of the Defendant, promised, &c. Exception was taken to that Declaration by Manwood and Mounson Justices, because it was not shewed, in what businesses certain, and betwixt what persons. Gawdy, The Plaintiff here is not to recover the Bills of Obligations, but damages only, and therefore needeth not to allege any Bills in certain. And 47 E 3. 3. A covenant with B, to assure unto B and his Heires, omnia, terras & tenementa quas habet, in such Counties, and for not assurance, an Action of Covenant was brought, and the Plaintiff declared, that the Defendant had broken the said Covenant, and that he had required the Defendant to make a feoffment unto him of all his Lands and Tenements in the said Counties; and the plea was not allowed, for the Land is not in demand, but only damages to be recovered. See also 46 E 3. 4. and 20 E 3. And in the principal case, the Plaintiff hath time enough for the shewing to the Jury what Bills of Obligations for the instructing of the Jury of the damages.

Trin. 30. Eliz. in the Kings Bench.

CLXIX. English, and Pellitary and Smiths Case.

Assault and
Battery.

IN an Action of Trespass of Assault and Battery and wounding: The Defendants say, that they were Lessees of certain Lands, and the Plaintiff came to the said Lands, and took certain posses which were upon the Lands, and they gently took them from him: S pleaded, that he found the Plaintiff and P contending for the said Posses, and he to part them molice, put his hands upon the Plaintiff; which is the same, &c. The Plaintiff replied, De injuriis suis propriis absque tali causa per ipsos P & S allegat. upon which issue was joyned, which was found for the Plaintiff. It was moved in arrest of Judgment, that there was not any issue, for the Plaintiff ought severally to reply to both pleas aforesaid, for here are several Causes of Justification, and his Replication, absque tali causa, doth not answer to both. Cook, This word (Causa) is, nomen Collectivum, which may be referred to every Cause by the Defendants alleged, reddendo singula singulis, and their Justifications are but one matter, and the Defendants might have all joyned in one plea. Wray, both pleas depend upon one matter, but are several causes, for two justifies by reason of their Interest, and the third for the preservation of the Peace. And by him and the whole Court, although it be not a good form of pleading, yet by reasonable construction this word (Cause) shall be referred to every cause, and so the pleading shall be maintained: And afterwards Judgement was given for the Plaintiff.

Nomen Col-
lectivum.

Trinit. 30. Eliz. In the Kings Bench. Intrat. Hill. 30. Rot. 58. or 581.

CLXX. Cater and Bothes Case.

Covenant.

IN a Bill of Covenant the Plaintiff declared, that the Defendant by his deed, bearing date the first of October, 28 Eliz. did covenant, that he would do every act and add at his best endeavour to prove the Will of I S, or otherwise, that he would procure Letters of Administration, by which he might convey such a Term lawfully to the Plaintiff, which he had not done, licet superius requisitus, &c. The Defendant pleaded, that he came to Doctor Drury in

into the Court of the Arches, and there offered to prove the Will of the said I S, but because the Wife of the said I S would not swear, that it was the Will of her Husband, they could not be received to prove it; Upon which it was demurred in Law. It was moved by Williams, that the Action doth not lie, for there is no time limited by the Covenant when the thing should be done by the Defendant, for which he hath time during his life, for as much as it is a collateral thing. See 15 E 4. 31. if there be not a Request before; but admit that the Covenant had been to perform upon request, then the Plaintiff in his Declaration ought to have shewed an expresse request with the place and time of it, for that is traversable. See 33 H 6. 47, 48. 9 E 4. 22. Gawdy. If the Covenant had been expresse to do it upon request, there the request ought to be shewed specially: But when a thing upon the exposition of the Law only is to be done upon Request, such Request alledged generally is good enough. And by Wray, the Covenant for hath not time during his life to perform this Covenant, but he ought to do it upon request within convenient time; but in some case a man shall have time during his life, as where no benefit shall be to any of the parties, as if the condition were to go to Rome: And as to the Request, be conceived, that it ought to be shewed specially and certainly; for it is for the benefit of the Covenantor, for without request, the Action doth not lie which Clench granted. And it was holden by the whole Court, that the barre shall not help the insufficient Declaration: So more, if the Defendant plead, Non Assumpsit, yet the defect in the Declaration of a Request not duly shewed, remaineth. Gawdy, the bringing of the Action is a Request. Clench, a Will of Debt is a Præcipe, for which there, licet sapius requisitus, is sufficient, but a Will of Covenant is not so.

Trin. 30. Eliz. In the Kings Bench.

C L X X I. Piers and Hoes Case.

[F]or an Action of Trespass, it was found by special verdict, that A seised of Land in the right of his Wife, being her Jointure by a former Husband, he and his Wife made a Feoffment to a stranger and his Heires, Habend. to the use of the stranger and his Heires during the life of the Wife only. Shuttleworth, the same is a forfeiture, for if the same Feoffment had been without any use expresse, then it should be to the use of the Feoffor and his Heires, and by consequence a forfeiture; and as the case is here, it is also a forfeiture; for during the life of the Wife the use is expresse to the use of the Feoffee and his Heires, and the remainder of the Fee-simple is to the use of the Feoffor, scil. the Husband and his Heires. Popham, I conceive that here is forfeiture, for here are several limitations, limitation of the estate unto one, and of the use unto another: And the words (for the life of the Wife) do not referre to the estate but to the use, with proximum antecedens; And he resembled the same to the case of Leonard Sturton, in which he was of Council. A man granted Lands, Habend. unto the Grantor, to the use of the Grantor, and the Heires of his body, the same is no estate tail in the Grantor, but only an estate for life, for the Limitation of the use cannot extend the estate. Cook contrary. The case is, that A, Wife of one Piers, being Tenant for life of the Jointure of the said Piers, took to Husband Hoe, they both by Deed grant totum suum Messuagium to one Clarke, Habendum to him and his Heires for the life of the Wife only, I conceive, that here is not any forfeiture, for it is but one intire sentence: And if there be a double construction of a deed, that which is most reasonable shall be taken, so as wrong be not done, and therefore these words (for the life of the Wife) shall referre unto both, scil. the estate and the use, and their intent was not to commit a forfeiture, as appeareth by the words of the Deed, for

Trespass.

Forfeiture.

Construction
of Deeds.

for they grant, solum messuagium, and that was not but for the life of the wife, ad solum usum, of the feoffee and his Heirs, during the life of the wife, and violence should be offered to this word (solum) if the feoffee or his Heirs, should have ultra the life of the wife, and the word (tantum) cannot otherwise be expounded, but that the estate for life only shall passe from them: And he cited the Case of 34. E. 3. Avowry 258. A gives Lands unto B in taile, and for default of such issue, to the use of C in taile, rendering Kent, the same render shall goe to both the estates: So a Lease for life to A, the remainder to B, to the use of C, the same use groweth out of both the estates, and not only out of the Remainder, so here upon the same reason, these words, for the life of the wife, shall refer to the first estate, as well as to the use; And in such Cases the rule of Bracton ought to be observed, viz. Benignæ faciendæ sunt interpretationes verborum, ut res magis valeat, quam pereat. As the Case in 6 H. 7. 7. in a Cessavit, the Plaintiff counted, that the Tenant held by Homage, Fealty, Suite at Court, and certain Kent, and in the doing of the services aforesaid, the Defendant had cessed, and in not doing of Homage and Fealty, a man cannot cesse by two yeares; But it was holden that the said Cessavit should be referred to such services only, in which one might cease, and that is Suite of Court, and Kent; And if pleadings shall have such favourable construction, a multo fortiori, shall a deed, 4 E. 3. Wast 11. A man leased for life, and by the same deed granted power unto the Lessee, to take and make his profit of the said Lands, in the best manner should seem good to him without contradiction of the Lessor or his Heirs; yet by those words it is not lawfull for him to doe wast, for there it is said, that in construction of Deeds, we ought to judge according to that intent, which is according to Law and reason, and not to that which is against reason: See 17 E. 3. 7. accordingly, so in the principal Case, the words in the Deed of feoffment shall be so expounded, that the estate be saved and not destroyed.

Popham contrary, the Cases put by Coke are not like to the Case in question; for where the Kent is out of both estates, the same is but reason, for the Kent is in respect of the Land, and because he departs with both estates, it is reason the Kent issue out of both, and the like reason is of the Case of an use, for if a man makes a Lease for life to A, the Remainder over to B, the same shall be to their use respectively, and if he doe expresse the use, the same shall be accordingly, and shall bind both estates, but there Clark hath two estates, one by the common Law, and the other by the Statute; But the words subsequent (for the life of the wife only) cannot refer to both estates: A. gives Lands to one and his Heirs for forty years, the same is but a plaine Terme for yeares: But if a feoffment in fee be made to one and his Heirs to the use of another for forty yeares, there the fee passeth to the feoffee, and the Terme to Cestuy que use, Gawdy conceived, that it is not any forfeiture, for these words (during the life of the wife only) were put in the Deed to expresse the intent of the parties, and therefore the same shall not be void, and be conceived that they were put in, to exclude the forfeiture, and therefore they shall serve for that purpose. And afterwards it was resolved by all the Justices except Gawdy, that it was a forfeiture, for by the feoffment the fee simple passeth, and that to the use of the feoffor, and the estate, and the use are severall things, and the limitation for the life of the wife cannot extend to both: And as to the Book of 24 H. 8. Br. Forfeiture 87. Tenant for life aliens in fee to B. Habendum sibi & heredibus suis, for the Terme of the life of the Tenant for life, the same is not a forfeiture, for the whole is but the limitation of the estate: And afterwards it was adjudged that it was a forfeiture, Gawdy continuing in his former opinion: And Wray said that he had conferred with the other Judges of their House, and they all held clearly, that it is a forfeiture.

Trin. 30. Eliz. in the Kings Bench. Rot. 528.

CLXXII. Toft and Tompkins Case.

Upon a speciall Verdict the case was, that the Grandfather, Tenant for life, the Remainder to the Father in taile, that the Grandfather made a feoffment in fee to the use of himselfe for life, the Remainder to the Father in fee; And afterwards they both came upon the Land, and made a feoffment to Tompkins the Defendant: Coke, there is not any discontinuance upon this matter, for the Father might well waive the advantage of the feoffment committed by the Grandfather, then when the Father joynes with the Grandfather in a feoffment, the same declares that he came upon the Land, without intent to enter for a feoffment: It was one Waymans Case, adjudged in the common Pleas, where the Disceise cometh upon the Land to deliver a Release to the Disceisee, that the same is no Entry to revert the Land in the Disceisee: When here it is the Liberty of the Tenant for life, and the grant of him in the Remainder, and he in the Remainder here was never seized by force of the tail, and so no discontinuance: Godfrey, here is a Remitter by the Entry, and afterwards a discontinuance, for by the Entry of both, the Law shall adjudge the possession in him who hath right, &c. Gawdy, this is a discontinuance, for when the Father entred, ut supra, he shall be adjudged in by the feoffment, and then he hath gained a possession, and so a discontinuance, for both cannot have the possession, Glensh, the intent of him in the Remainder when he entred was to joyne with the Grandfather, and when his intent appeareth, that the estate of the Grandfather, and his own also shall passe, that both declare that he would not enter for the feoffment: Sute agreed with Gawdy.

Trinit. 30. Eliz. in the Kings Bench.

CLXXIII Broake and Doughties Case. Hil. 31. Eliz.

Rot. 798.

An Action upon the Case for words, viz. Thou wast forsworne in the Court of Requests, and I will make thee stand upon a Stage for it: It was found for the Plaintiff; It was moved in arrest of Judgement, that the Action will not lye for these words, for he doth not say, that he was there forsworne as Defendant, or witnesse: And Trin. 28. Eliz. betwixt Hern and Her, thou wast forsworne in the Court of Whitchurch; And Judgement given against the Plaintiff, for the words are not Actionable, and as to the residue of the words, I will make thee stand upon the Stage for it, they are not Actionable as it was adjudged betwixt Rylie and Trowgood, if thou hadst Justice thou hadst stood on the Pillory, and Judgement was given against the Plaintiff: Daniel contrary, thou wast forsworne before my Lord chief Justice in audience, these words are Actionable, for that is perjury upon the matter, and betwixt Foster and Thorne, T. 23. Eliz. Rot. 882. Thou wast falsly forsworne in the Star Chamber, the Plaintiff had Judgement, for it shall be intended that the Plaintiff was Defendant or a Deponent there: And yet the words in the Declaration are not in the Court of Star Chamber. Wray, thou art worthy to stand upon the Pillory, are not Actionable, for it is but an implication, but in the words in the Case at the Bar there is a vehement intendment, that his oath was in the quality of a Defendant, or Deponent, which Gawdy grants, in the Case 28. Eliz. Thou wast forsworne in Whitchurch

Church Court, there the words are not actionable; for that Court is not known to you as Judges. And it may be it is but a great House or Parson house called Whit-church Court: But here in the principal case it cannot be meant but a Court of Justice, and before the Judges there jurisdiction, and the subsequent words sound so much, I will make thee stand upon a Stage for it. And afterwards Judgement was given for the Plaintiff.

Trin. 30. Eliz. In the Kings Bench.

CLXXIV. Gatefould and Penns Case.

Prescription
for tythes.

Gatefould Parson of North-linne libelled against Penne in the Spiritual Court for tythes in kind of certain pastures: The Defendant to have prohibition both surmise, that he is Inhabitant of South-linne, and that time out of mind, &c. every Inhabitant of South linne having pastures in North linne hath paid tythes in kind for them unto the Vicars of South-linne, where he is not resident; and the Vicar hath also time out of mind payed to the Parson of North-linne for the time being two pence for every acre. Lewis, this surmise is not sufficient to have a prohibition, for upon that matter Modus Decimandi shall never come in question, but only the right of tythes, if they belong to the Parson of North-linne, or to the Vicar of South-linne, and he might have pleaded this matter in the Spiritual Court, because it toucheth the right of tythes, as it was certified in the Case of Bashly by the Doctors of the Civil Law. Gaudy, this prescription both stand with reason, for such benefit hath the Parson of North-linne, if any Inhabitant there hath any Pastures in South-linne. And afterwards the whole Court was against the prohibition, for Modus Decimandi shall never come in debate upon this matter, but who shall have the tythes, the Vicar of South-linne, or the Parson of North-linne? and also the prescription is not reasonable.

Trin. 30. Eliz. In the Kings Bench.

CLXXV. Gomersal and Bishoppes Case. *Hill. 31. Eliz. R. 175.*

Prohibition
for tythes.

Bishop libelled in the Spiritual Court for tyth Hay, the Plaintiff Gomersal made a surmise, that there was an agreement betwixt the said parties, and for the yearly sum of seven shillings to be paid by Gomersal unto Bishop, Bishop faithfully promised to Gomersal, that Gomersal should have the tythes of the said Land during his life. And upon an Attachment upon a Prohibition Gomersal declared, that for the said annual sum Bishop leased to the Plaintiff the said tythes for his life: And upon the Declaration Bishop did demurre in Law for the variance between the surmise and the Declaration, for in the surmise a promise is supposed, for which Gomersal might have an Action upon the Case; and in the Declaration a Lease. But note, that the surmise was not entered in the Roll, but was recorded by it self, and the Declaration only enrolled. Godfrey, it was resolved in the Case betwixt Pendleton and Huor, that an Agreement betwixt the Parson and any of his Parishioners is a good cause to grant a Prohibition, if he libel in the Spiritual Court against such Agreement, because the Spiritual Court cannot try it, and they will not allow such a Plea. Curia, the surmise is as a writ, for which if variance be betwixt the same and the Declaration all is naught.

Trin.

Trin. 30. Eliz. in the Kings Bench.

CLXXVI. Colbourne and Mixstones Case. Intrat. Hill. 31.
Eliz. Rot. 146.

Colbourne was sued in the Spiritual Court, for that being Executor to one Alice Leigh, he had not brought in a true Inventory of all the goods of the said Alice, but had omitted and left out a lease of two houses, and this sute was at the pursuit of two Daughters of the Testator. Colbourne saith for a Prohibition; and surmises and declares, how this Lease is exting-
ished, and the matter was this, H Leigh was seised of a house called the Marigold, and two other houses in London, and leased the said two houses to one Alice Cheape for one and twenty yeares, if she should live so long, and afterwards made a Lease in Reversion of the said two houses to the said Alice Leigh for one and twenty yeares, and afterwards he devised these two houses, and also the house called the Marigold to the said Alice Leigh for her life for to bring up his children, and dyed, after whose death the said Alice Leigh entred into the said house called the Marigold, and took the rents and profits of the said two houses for the space of seven yeares, virtute testament. pradiet. upon which Declaration the Defendants do demurre in Law. Cook, the Declaration is not good, and for the matter of it, it is clear, that by this devise unto Alice, her Term in future is not exting-
ished without her agreement to it: And also in this Case the Devise is not for the benefit of the said Alice Leigh, but of her children, and she hath a liberty to accept or refuse the said estate by devise, and to make her election: And the Plaintiff hath declared, that she hath accepted the Rent reserved upon the lease of the said two houses for seven yeares: And therein the Declaration naught in divers respects. 1. He hath declared, that the said Alice Leigh hath accepted the Rents of the said two Houses, by reason of the reversion, & virtute Testament. pradiet. by seven yeares, which is double and treble, for acceptance of a Rent at one day, scil. one rent day is a sufficient election: As if the Issue in tail, after the death of his Ancestor, who hath made a Lease not warranted by the Statute, once accepts the Rent, the Lease is affirmed, but if in plea pleading, the acceptance of the said Rent for three yeares be pleaded, the same clearly is not good, for no good Issue can be taken thereupon: 2. This acceptance is not pleaded (as the Law wills) and in the phrase of the Law, viz. to which devise she agreed, but pleads the acceptance of the Rent, which is matter of evidence, the which is not good pleading. As 5 H 7. 1. One sweareth another to enter into his Land, and the same to occupy for a certain time, the same is a Lease in Law, and if in pleading the party is to make his title to the same Land, he ought plead it as an expresse Lease, and not as a Licence, and if the Lease be traversed, he may give the Licence in evidence. Tanseild presently by the devise, The estate for life is in the Devisee and the Term exting by it, and that is sufficient for the Plaintiff: And if there was any disagreement the same is to be shewed on the other side. But if Alice had not notice of the Devise, but dyeth before notice, the same amounteth unto a disagreement. And as to the pleading of the Agreement, I conceive it is well enough pleaded, for if the Lease had not been she might have entred, then if such Entry had been pleaded it had been good enough; and then because she could not enter by reason of the said Lease, she hath taken the rents and profits which is an actual agreement; and as wrong as an Entry. Also we have shewed that she had entred into the house called the Marigold, of which the Devisee dyed seised in possession, and that is a sufficient agreement for the whole, for it is an entire Legacy. As 18 E 3. Variance 63. If the Re-
version of three acres be granted, and the Tenant for life attorneth for one a-
cent not to be apportioned.

cre, it is a good attornment for the whole, for he cannot apporportion his assent: and 2 E. 4. 13. If the Executors deliver unto the Debisee goods to him devised to redeliver them to him again at such a day, the same is a good assent, and execution of the Debise, and the words of the redelivery are void. Gawdy, The debise doth not vest the estate in the Wife until agreement, where a man takes in a second degree, as in a Remainder the same vests presently before agreement, but where he taketh immediately it is otherwise, and he held the agreement was well enough pleaded. Wray, presently upon the death of the Testator, the freehold rested in the Debisee, and if it was not an Agreement, ut supra, by taking of the Rents, yet the entry into the Marygold was a consent, and an execution of the whole Legacy; and as to the rest he agreed with Gawdy. Clench, the freehold rested presently in Alice Leigh before agreed, also the entry into the Marigold is an execution of the whole Legacy to the Debisee, for her entry shall be adjudged most beneficial for her; and that is, for all the three houses.

Trin. 30. Eliz. in the Kings Bench.

CLXXVII. *Stranham and Medcalves Case*

STranham libelled in the Court of the Bishop of Norwich against Medcalfe, for a portion of Wythes, as farmor of the Rectory of Dunham: The Parson of Stonham came in and said, that the Land, whereof the Wythes are demanded, is in his Parish of Stonham, and not in the Parish of Dunham; and afterwards sentence passed against Stranham; who brought an Appeal, and notwithstanding that, by the Statute of 32 H. 8. cap. 7. the Spiritual Judges may proceed to make process against the Appellant for costs, for the principal matter, scil. parcel, or within such a Parish or not is tryable at the Common Law. Cook now prayed a Consultation; and he confessed (ut supra) that the matter was tryable at the Common Law; but yet the costs were not given for the matter, but for the unjust vexation, and it was his sute and own act to prosecute the same in the Spiritual Court. Note, that Stranham had a Prohibition to stay the proceedings for the costs, for in some cases the Plaintiff himself, who libelleth, may have a Prohibition, and that was the case betwixt Wignall and Brook. And afterwards a Consultation was granted by the Court, for Stranham had begun the sute in the Spiritual Court in the principal matter, and therefore he cannot have a Prohibition for the costs. But afterwards Judgement was stayed, for the said Statute speaks specially in case of Wythes, where the Court hath Jurisdiction; and here it hath not of the matter: But it was said, that if a Consultation be once granted, the party shall never have another Prohibition in the same cause, as it was holden in the case betwixt Hoskins and Jones.

No Prohibition for costs in the Spiritual Court.

Pasch. 31. Eliz. Rot. 186. In the Kings Bench.

CLXXVIII. *Chamberlain and Thorps Case.*

In Debt upon a Recognizance acknowledged in London, the Plaintiff declared, that London is antiqua Civitas, and that they have used time out of mind, &c. That the Mayor take Recognizances of any person being of full age, and not a feme covert, every day in the year, except Sundayes, Holydayes, Council dayes, and dayes of Quarter Sessions and Coale-delivery; And declared further, how that the Defendant such a day did acknowledge a Recognizance to him, &c. Fanfeild, the Declaration is not good, but the custom

Recognizances in London, by custom.

Some. as it is laid, Is unreasonable, for thereby, the Payor might take Recognizances of Idiots, men of Non sana Memoria, &c. nor is it restrained to any persons, or to any matters, but is too general, and therefore cannot be a good custome: Gawdy, the Declaration is good notwithstanding the Exception for want of averment, for that ought to come in on the other side. And as to the custome I conceive it is not good, for it is hard. That they should take Recognizances of all Persons, and for all Causes which rise out of the City, and through the whole Realm, as well as within the City: also none shall take a Recognizance, but a Judge of Record, and a Recognizance cannot be taken by prescription. As to the first Exception, Wray agreed with Gawdy, and as to the Custome, he held the same to be good. For it hath been always allowed, and their customes are confirmed by Act of Parliament which makes them good. But if the custome be not confirmed by Parliament it is not good; also it is not an unreasonable Custome, for it is for the benefit of the Subjects to have security for their debts. Cook, The Recognizance makes the Debt local, and therefore 13 Rich. 2. bar 649. Debt was brought in London upon a Recognizance acknowledged in the Chancery at Westminster, and the Writ was abated, for the Recognizance makes it local there; and by him the custome stands with reason, The Payor is such a person who may take a Recognizance, for he is a Judge of Record. See 1 H. 7. 20. and Br. Recognizance 8. and the Recognisee cannot have an Action of Debt upon this Recognizance elsewhere then in London. For it is not a debt out of the Jurisdiction of the Court, for the Recognizance hath made it local. Wray, If the Recognizance be within age, the same shall come in of the other side, and the Plaintiff needs not shew the same in his Declaration, Cook, It was agreed betwixt Mabbie and Friend, That such a Recognizance was good. Tanfield, the said Recognizance was taken for Diphans goods which is a thing within their Jurisdiction. Clench, They of London cannot take Recognizance of more then they can hold plea of it. Wray, they have used of long time to take Recognizances, and their customes are confirmed by Parliament, and a more strange custome then this hath been allowed of here before, for That a feme Covert shall sue an action alone without her Husband, for she is a sole Merchant; Also they do certifie Recognizances ore tenus, Gawdy, a feme Covert may have an action within the City, but not here.

Hil. 32. Eliz. R. 434 In the Kings Bench.

C L X X I X Pierce against Howe

An Action upon the Case for these words, Pierce hath taken a false Oath in the Consistory Court of the Bishop of Exeter, and upon the Declaration, the Defendant did demur in Law. And by Prideaux these words are actionable, although the perjury be supposed to be committed in the spiritual Court; For he shall be excommunicated if he will not appear, and he shall do penance in a White sheet, which is as great a disgrace as to be set upon the Pillory. And it was ruled in an action upon the case betwixt Dorrington and Dorrington, upon those words, Thou art a Bastard, that an action lyeth, and yet Bastardy is a spiritual matter, and there determinable; So for these words. Thou art a Pirat, an action lyeth, and yet Piracy is not punishable by the common Law, but in the Court of Admiralty. And these words, He hath taken a false oath, do amount to these words, He is forsworn. Wray conceived, that the words are not actionable, for there is a proviso in the Statute of Eliz. cap. 9. That the said Act shall not extend to any Ecclesiastical Court, but that every such offender shall be and may be punished by such usual and ordinary Lawes as heretofore hath been, and is yet used, and

Action upon
the case for
words.

frequent in the said Ecclesiastical Court; Gawdy upon these words, an action doth not ly, for they are not pregnant of any perjury in the Pl. for he may be meer palse in it: for if one of the Masters of the Chancery minister an Oath unto any person, or any Commissioners, &c. and the Plaintiff sweareth falsely, a man may say, That the Master of the Chancery, or the Comyns, hath taken a false oath: and yet he is not guilty of falsity. And afterwards Wray, mutata opinione, That the Proviso in the said Statute, is to this intent, That notwithstanding the said Statute, such an offence may be examinable and examined in the Ecclesiastical Court in such manner as it was before, but the same doth not take away or restrain the authority of the Common Law, but that such an offence may be here examined. And it hath been lately adjudged in the Star-Chamber, That such perjury was examinable there, for it is not restrained: and as to the latter exception, upon these words (he hath taken a false oath) it shall be intended actively, and not passively, and if so, the defendant ought to have so pleaded it, and afterwards judgement was given for the Plaintiff.

Triu. 30. Eliz. In the Kings Bench.

CLXXX. Palmer and Smallbrookes Case.

In an action upon the Case by Palmer against Smallbrook, The Plaintiff declared, That the Defendant had recovered a certain debt against A. and thereupon purchased a Writ of Capias against A. to take his body and delivered the said Capias to the Plaintiff being then Sheriff, and prayed a Warrant for the serving of the said Capias; and that he would name in it, one B. for special Bailiff, and promised the Plaintiff that if B. arrested A. by force of the said Capias, and suffered him to escape, That he would not sue the Plaintiff for the said escape: and shewed further, That he made a Warrant according to the said Capias, and therein named and appointed the said B. his special Bailiff, who arrested A. accordingly and afterwards suffered him to escape, and the Defendant notwithstanding his promise aforesaid, sued the Plaintiff, for the said escape. And it was found for the Plaintiff; It was moved in arrest of Judgement, That the promise is against the Law, to prevent the punishment indicted by the Statute of 23 H. 6. upon the Sheriff, and it is merely within the Statute, and so the promise void. Cook, The same is not any Bond or promise taken of the Prisoner, nor of any for him, and therefore it is not within the Statute, and it was Danvers Case. Wray, A promise is within the Statute as well as a Bond but the Statute doth not extend but where the Bond or promise is made by the prisoner, or by any for him; And after Judgement was given for the Plaintiff.

Hill. 30. Eliz. In the Common Pleas.

CLXXXI. Mounson and Wests Case.

In Trespass by Mounson against West, the Jury was charged and evidence given, and the Jurours being retired into a house for to consider of their evidence, they remained there a long time without concluding any thing; and the officers of the Court who attended them seeing their delay, searched the Jurours if they had any thing about them to eat: upon which search it was found, that some of them had figs, and others pippins, for which the next day the matter was moved to the Court, and the Jurours were examined upon it upon Oath. And two of them did confesse that they had eaten figs before

they had agreed of their verdict: and three other of them confessed, That they had Pippins, but did not eat of them. and that they did it without the knowledge of Will of any of the Parties. And afterwards the Court set a fine of five pounds upon each of them which had eaten, and upon the others who had not eaten forty shillings. And they would advise, if the verdict was good or not, for the Jury found for the Plaintiff. And afterwards at another day, the matter was moved, and Anderson was of opinion, That notwithstanding the said misdemeanour of the Jury, the verdict was good enough, for these signals were not given to them by any of the Parties to the action, nor by their means, or procurement. Rhodes thought the contrary, because some of the Jurours had eaten, and some not, contrary if all of them had eaten. See 14 Hen. 7. 1. A Jury was charged and before their verdict, they did eat and drink, and it was holden that upon that misdemeanour, their verdict was void, for which cause a venire facias de novo was awarded. And it was prayed by the Counsel of the Defendant West, That the said misdemeanour so found by examination might be entred of Record, which the Court granted. And afterwards at another day, the matter was moved again. And upon great advice and deliberation, and conference with the other Judges, The verdict was holden to be good notwithstanding the misdemeanour aforesaid. See 24 E. 3. 24. 15 Hen. 7. 1. 2. Hen. 7. 3. 29 Hen. 8. 37. and 35 Hen. 8. 55. Where it was holden, where the eating and drinking of the Jury at their own costs is but fineable, but if it be at the costs of any of the parties, the verdict is void. And see Book Entries 251. The Jurours after they went from the Bar ad seiplos of their verdict to be advised, comedunt quoddam species, sci. raisins, dates, &c. at their own costs, as well before, as after they were agreed of their verdict; And the Jurours were committed to prison; but their verdict was good, although the verdict was given against the King.

Hill. 30. Eliz. In the Common Pleas.

CLXXXII. Hunt and Gilborns Case.

In Dower brought by Hunt and his Wife against Gilborn, The Defendant pleaded, That the Land of which Dower is demanded, is of the nature of Gavelkind, and that the custome is, That in Dower of Land of such nature The Wife ought to be endowed of the moiety of such Land, Tenendum quatinus non maritata remanserit, & non aliter: upon which plea in bar, the Demandants did demur in Law; and the Lord Anderson was of opinion, That the Custome is strongly pleaded against the Dower in the affirmative with a Negative & non aliter, and that is confessed by the Demurrer, That Dower out of such Land ought to be so allotted, and so demanded, and in no other manner. And by Periam, If those words (& non aliter) had not been in the Plea; yet the Demandants should not have Judgement: For Dower by moiety, & non maritatus, is as proper in case of Gavelkind, as Dower of the third part of Land, at the Common Law, and as the descent in such case of Lands to all the Sons. And afterwards Judgement was given against the Demandants.

Dower of Gavelkind by Custome.

Hill.

Hill. 30. Eliz.

CLXXXIII. The Case of the Provost and Schollars of Queens
Colledge in Oxford.

The Provost, Fellowes, and Schollars of Queens Colledge in Oxford, are Guardians of the Hospital, or Meason de Dieu in Southampton. And they make a Lease of the Land parcel of the said Hospital to one Hazel for Term of years by the name Præpositus socii & Scholares Collegii reginalis in Oxonia, Gardianus Hospitalis, &c. And in an Ejectione firmæ upon that lease, It was found for the Plaintiffs, and it was objected in arrest of judgement, That the word Gardianus, ought to be Gardiani, for the Colledge doth consist of many persons, and every person is capable, and it is not like unto Abbot and Covent: But the whole Court was of opinion, that the Exception was good, but that as well the Lease as also the Declaration was good, for the Colledge is one bodie, and as one person: And so it is good enough Gardianus.

Hill. 30. Eliz. in the Common Pleas.

CLXXXIV. Wooden and Hazels Case.

Nisi Prius.

In an Ejectione betwixt Wooden and Hazel they were at issue upon, Not Guilty: and a Venire facias awarded returnable, Tres Trinit. And the Effoin adjudged and adjourned by the Plaintiff untill Michaelmas Terme; And at the next Assises, the Plaintiff notwithstanding that Effoin, and the adjourning of it procured a Nisi Prius, by which it was found for the Plaintiff: And now it was moved in Court for the Bar of Judgement, because no Nisi Prius ought to issue in the Case. For the Effoin was adjudged and adjourned untill Michaelmas Terme by the Plaintiff himself. And Lennard custos Brevium said, That the Words of the Statute of Westminster 2. cap. 17. Postquam aliquis posuerit se in aliquem inquisitionem ad proximum diem allocet. ei effoin. imports, That the Effoin shall not be taken at the return of the Process against the Jury, although the Jury be ready at the Bar. Anderson was of opinion, That the awarding of the Nisi Prius ut supra, is but a nullawarding of the Process, and then reliev'd by the Statute. And afterwards the case being moved at another day, the Court was clear of opinion, That no Nisi Prius ought to issue forth in this case, because that the Plaintiff himself, by the adjourning of the Effoine, cast by the Defendant untill Michaelmas Terme, had barred himself of all Proceedings in the mean time: But afterwards it was surmised to the Court on the Plaintiffs part, that he the Defendant was not effoined, for the name of the Defendant is Edward Hazel, and it appeared upon the tryal that Edward Russel was effoined, but no Edward Hazel, and then if no Effoin, no adjournment, and then the Plaintiff is at large, &c. and may proceed, &c. But the Remembrance of the Clark was Edward Hazel, as it ought to be, and yet it was holden of no effect, being in another Terme: And afterwards the Counsel of the Defendant prayed, That the Roll in hac parte, be amended according to the Remembrance of the Clark: But the Court utterly denied that, for no Statute gives amendment, but in the affirmance of Judgements, and Verdicts, and not in defeazance of Judgements or Verdicts: and afterwards it was resolved by the whole Court, That Judgement be entred for the Plaintiff.

Effoin.

Amendment.

Hill.

Hil. 32. Eliz. Intratour M 29. and 30. Eliz. Rot. 2116.

C L X X V. Sir Henry Goodiers Case.

In an Ejectione firmæ the Case was, Sir Ralph Rowlet possessed of certain Lands for years, made his Will, and ordained Sir Nicholas Bacon, Keeper of the great Seal of England, Sir Robert Carline, Lord Chief Justice of England, Justice Southcole, and Gerrard Attorney General his Executors, and dyed. And afterwards the said persons named Executors, sent their Letters to the Chief Officer of the Prerogative Court as followeth. Whereas our Loving friend Sir Ralph Rowlet Knight, lately deceased, made and ordained us Executors of his last Will, and whereas our Business is so great, That we cannot attend the execution of the said Will, Therefore we have thought good to move the bearer hereof M^r. Henry Goodier one of the Co-heirs of the said Sir Ralph to take upon him the execution of the said Will. And therefore we pray you to grant Letters of Administration in as ample manner as the Justice of the cause doth require; and afterwards an Entry was made in this manner in the same Court. Executores testamenti prædicti executionem inde super se assumere distulerant & adhuc distarent: And upon that the said Goodier obtained Letters of Administration, and granted a Lease to A for years, of which the said Sir Ralph Rowlet dyed possessed. And afterwards Sir Robert Carline claiming as Executor, granted the same Term to another, &c. and all the matter of difficulty was, If this Letter written by the Executors be a sufficient Renunciation of the Executorship in Law, so as the Executors cannot afterwards claim or use the said authority, &c. 2. If the Entry of the said Renunciation be sufficient and effectual. And it was argued by Ford, one of the Doctors at the Civil Law, That as well the Renunciation as the Entry of it is good and sufficient in Law, so that none of the Executors could after intermeddle. And he said, That in their law, there is not any certain form of Renunciation, but if the meaning and intention of the Renouncer appeareth, it is sufficient without any formall termes of Renunciation: And he put many rules and Maxims in their Law to the same purpose. Ego dico me nolle esse hæredem, are sufficient words to such intent. Non vult hæres esse quin ad aliam transferre debet hæreditatem. Qui semel repudiavit hæreditatem non potest eam repetere. Quod semel placuit, post displicere non potest; variatio non permittitur in contractibus. So that after the Executors have signified to the Officer of their Court their pleasure to renounce the Execution of the Will, they cannot afterwards intermeddle, nam interest reipublicæ ut dominia rerum sint in certo. And as to the Entry of the said Renunciation inter acta Curie, distulerant et adhuc distarent, that was the error of the Clerk. And it is a Rule in our Lawe, veritas rerum gestarum non viciantur errore factorum. And the Lord Anderson demanded of the said Doctor, how far those words hæres, et hæreditas did extend in their Law, who answered, That hæreditas comprehends all Chattells, as well real as personal, Inheritance as Chattels, for by their Law, Hæreditas nihil aliud est quam successio in universum jus quod defunctus habuit tempore mortis suæ. And afterwards the Court gave day to the other party to hear an Argument of their side, but the case was so clear, That no Professor of the Civil Law would be retained to argue to the contrary. And afterwards Judgement was given, That the said Renunciation, and the entrie of it was sufficient.

Renouncing
of an Execu-
tor-ship.

Mich. 30 Eliz. in the Common Pleas.

CLXXXVI. Littleton and Pernes Cafe.

Debt.

Littleton brought Debt upon an Obligation against Humphry Pernes, who pleaded, that the said Obligation was endorced with this condition, for the performance of certain Articles and Covenants contained in certain Indentures, by which Indentures the Plaintiff first covenanted, that Edward brother of Humphry should enjoy such Land until the first of Michaelmas next following, rendering such Rent at the end of the said Term: and the said Humphry covenanted, that the said Edward at the feast aforesaid should surrender quietly and peaceably the said Lands to the Plaintiff, and that the said Plaintiff to such of the said Lands as by the custom of the Country, tunc jacebant frisca, should have in the mean time free ingress, egress, &c. at his will and pleasure, with his servants, ploughs, &c. And as to that Covenant, the Defendant pleaded, Quod permittit querentem habere intrationem & exitum, &c. in tales terras, quales tunc jacebant secundum consuetudinem patris, &c. And Exception was taken to this plea, because he hath not shewed in certain, which Lands they were which then did lie free, according to the customs of the Country; which Anderson allowed of, but Walmesley strongly insisted to the contrary: And he confessed, that where an Act is to be done, according to a Covenant, he who pleads the performance of it ought to plead it specially; but as our case is, here is no Act to be done, but a permittance as aforesaid, and it is as in the Negative, a not disturbance, in which case permittit is a good plea; and then it shall come on the other side on the Plaintiff's part, to shew in what Lands the Defendant non permittit: Which difference was agreed, 17 B. 4. 2. 6. by the whole Court. And such was the opinion of the whole Court in the principal case.

Another Exception was taken to it, that the Defendant had covenanted, that his brother Edward should pay to the Plaintiff the said Rent; To which the Defendant pleaded, that his said brother had payed to the Plaintiff before the said feast of Michaelmas, in full satisfaction of the said Rent, three shillings, and that was holden a good plea; and upon the matter the Covenant well performed, for there is not any Rent in this Case, for here is not any Lease, and therefore not any Rent. For if A covenant with B, that C shall have his Land for so many years rendering such a Rent, here is not any Lease, and therefore neither Rent. But if A had covenanted with C himself, it had been otherwise, because it is betwixt the same parties. And if the Lessee covenant to pay his Rent to the Lessor, and he payeth it before the day, the same is not any performance of the Covenant, causa patet, contrary of a sum in gross: Another Covenant was, that the said Humphry solveret ex parte dicti Edwardi 20 l. to which the Defendant pleaded, that he had paid ex parte dicti Humfridi 20 l. and that defect was holden incurable, and therefore the Plaintiff had Judgement to recover.

Mich. 30. Eliz. in the Common Pleas.

CLXXXVII. Gesslin and Warburtons Cafe.

In an Ejectione firmæ by Joan Gesslin against Hen. Warburton and Sebastian Crispe of Lands in Dickilborough in the County of Norfolk, Mich. 30. and 31 Eliz. rot. 333. upon the general Issue, the Jury found a special verdict, that before the Trespasse supposed one Martin Frenze was seised of the Lands,

Lands, of which the Action was brought in tail to him and the Heires males of his body, and so seised suffered a common Recovery to his own use, and afterwards devised the same in this manner: I give my said Land to Margaret my Wife, until such time as Prudence my Daughter shall accomplish the age of nineteen yeares, the Reversion to the said Prudence my Daughter, and to the Heires of her body lawfully begotten, upon condition that she the said Prudence shall pay unto my said Wife yearly during her life, in recompence of her Dower of and in all my Lands twelve pounds, and if default of payment be made, then I will that my said Wife shall enter and have all my Lands during her life, &c. the Remainder, ut supra, the Remainder to John Frenze in tail, &c. Martin Frenze dyed; Margaret entred, the said Prudence being within the age of fourteen yeares; Margaret took to Husband one of the Defendants, John Frenze being Heir male to the former tail brought a Writ of Error upon the said Recovery and assigned Error, because the Writ of Entry upon which the Recovery was had, was Precipe quod reddat novum Messuag. and twenty acres prati in Dickleborough, Lynford, Hamblets, without naming any Town: And thereupon the Judgement was reversed. And it was further found, that in the said Writ of Error and the process upon it, no Writ of Scire facias issued to warne dictam Prudentiam tep. existentem liberi ten. premissorum, ad ostendendam quid haberet, vel dicere sciret quare Judicium predictum non reverteretur: The Jury further found, that the said Margaret, depending the said Writ of Error, was possessed virtute Testamenti & ultimæ voluntatis dict. Martini, reversione inde expectant, dictæ Prudentiæ pro ut lex postulat: And they further found, that six pound of the said twelve pounds were unpaid to the said Margaret at the feast &c. and they found, that the said John Frenze, pretextu Judicii sic reverterat, entred into the premises as Heir male, ut supra. And so seised, a Fine was levied between John Frenze Plaintiff, and one Edward Tyndal, and the said Prudence his Wife Defendants, and that was to the use of the said John Frenze: And that afterwards Humphry Warberton and the said Margaret his Wife, brought a Writ of Dower against the said John Frenze, Edw. Tyndal, and Prudence his Wife, of the said Lands: The said Edward and Prudence made default, and the Demandants counted against the said Frenze, and demanded against him the moiety of the third part of the said Lands: To which the said Frenze pleaded, that the default of the said Edward and Prudence idem Joh. Frenze nomine non debet, quia he said, that he the said John was sole lessee of the Lands aforesaid at the time of the Writ brought, &c. and pleaded in Barre, and it was found against the said John, and Judgement given for the Demandants of the third part of the whole Land, and seisin accordingly: And that afterwards, 17. Eliz. the said Frenze levied the Fine to the said Tyndal, to the use of the said Tyndal and his Heires: And they found, that after the said feast the said Henry Warberton and Margaret his Wife came to the Messuage aforesaid half an hour before sun-set of the said day, and there did demand the debt of the said twelve pounds, to the said Margaret, by the said Martin Frenze devised, to be paid unto them, and there remained till after sun-set of the said day, demanding the Rent aforesaid, and that neither the said Tyndal nor any other was there ready to pay the same.

And first it was moved, if the said yearly sum of twelve pounds appointed to be paid to the said Margaret were a Rent, or but a sum in grosse: And the opinion of the Court was, that it was a Rent, and so it might be fitly collected out of the whole Mill, where it is said, that Prudence his Daughter should have the Land, and that she should pay yearly to Margaret twelve pounds in recompence of her Dower, &c. But if it be not a Rent, but a sum in grosse, it is not much material to the end of the case: For put case it be a Rent, the same not being pleaded in barre, the Dower is well recovered, and then when default of payment is made, if the Wife of the Devisor shall have the whole,

Devises.

Error:

Dower:

was the Question: And the Court was clear of opinion, that by the fate and Judgement in the Writ of Power, the Wife of the Debtor had lost all the benefit which was to come to her by the devise: For the said Kent was devised to her in recompence of her Dower, so as it was not the meaning of the Debtor that his Wife should have both. And therefore by the Recovery in Dower she had dismissed her self of the Kent, and by consequence of the benefit of the penalty for non payment of it.

Hill. 30. Eliz. in the common Pleas.

CLXXXVIII. Stephens Case.

Fines levied
raise an use.

In an Ejectione firmæ the case was, that the Father covenanted with one A, that in consideration of a Marriage to be had betwixt the Son of the Covenantor and the Daughter of A, that he before such a day would levy a Fine, which Fine should be to the uses of the said Son and Daughter in tail for the Joyniture of the Daughter. The Fine is levied accordingly to the uses aforesaid: The Father dyeth, but in the Fine no mention is made of any marriage had: And upon that matter the Court was clear of opinion, that notwithstanding that the marriage was not accomplished, yet the estate tail was well enough executed in the Son and Daughter, for the Fine without any consideration doth carry the uses, but without a Fine such a consideration would not raise such an use without accomplishment of the marriage, for the consideration executed ought to produce the use. But in this case the uses are perfected by the Fine, and A upon the matter might have had covenant against the Father to have the Fine before the marriage.

Mich. 30. Eliz. in the Common Pleas.

CLXXXIX. Billford and Foxes Case.

Debt.

Superedeas by
the Husband
is not good for
the Wife.

Billford brought an Action of Debt against Fox and his Wife, Executrix of Bone A her former Husband, proccesse continued against them, till the Exigent, upon which the Husband appeared, and put in a Superedeas for himself only, without making mention of his Wife, and the case being moved to the Justices, they demanded of the Preignothories what was to be done, for the same is practise and a dangerous case for example. And it was answered by the Preignothories, that the Court cannot remedy it, for now by the Superedeas the Husband is sine die, for he shall not be given to answer without his Wife, as this case is, and he is impleaded, as in the right of his Wife, and therefore the Wife shall be waited, and the Husband discharged. See the Book of Entries 187. Debt against the Husband and Wife, and proccesse continued until the Exigent, the Husband rendered himself, and the Wife was waited, and Judgement given, quia videbitur Justiciariis hic that the Husband absque prefata uxore sua respondere non potuit, & rationi dissonum sit, ipsum in Curia hic, cum in eadem loquela respondere non potuit, ulterius decerni, ideo eat inde sine die. And so see 43 E 3. 18. Petition against the Husband and Wife, the Wife is waited, and the Husband rendered himself at the Exigent. And the point of the Action was upon a bayment to the Wife, dum sola fuit, and the Husband was sine die, for he could not answer in such case without the Wife. But at the last the Justices advised thereof, and gave order that the Superedeas should be stayed without recording the appearance of the Husband. And by Anthrobus one of the Attorneys of the Court, that was the case of the Lady Malory and her Husband, who were sued in an Action

Action of Debt, and proceſſe continued againſt them till the Exigent, upon which the Husband appeared and put in a Superſedeas for himſelf, without ſpeaking of his Wife; and his Superſedeas was not allowed, but proceſſe continued until Out-lawry.

Hill. 30. Eliz. in the Common Pleas.

C X C. *The Queen againſt the Biſhop of Canterbury and others.*

The Queen brought a Quare Impedit againſt the Archbiſhop of Canterbury, the Biſhop of Chicheſter, and the Incumbent: And counted, that Aſhburnham was ſeſſed of the Advowſon, and that he was out-lawed in an Action perſonal at the ſute of ſuch a one, and ſhewed the whole Out-lawry certain. And Exception was taken to the Count, becauſe in the ſetting down of the Out-lawry, the proceſſe is alledged to be returned by the Sheriff, but the name of the Sheriff is not there expreſſed. As to that, it was agreed by the Court that the truth is, that it is provided by the Statute of 12 E 2. cap. 5. That the Sheriffs in their returns put their names to the ſaid Returnes; but it is not requiſite ſo to plead it, for the omitting thereof both not make the Return void, but the Sheriff ſhall be amerced.

Another matter was objected, for that whereas the Patron had pleaded one plea, and the Incumbent the ſame plea by himſelf in barre. The Queen demurred in Law in this manner. quoad ſeparalia placita per dictos, &c. ſeparaliter placitat. &c. Dicta Domina Regina necesse non habet, nec per legem terræ tenetur, respondere: And the Court was clear of opinion, that the Demurrer ought to have been ſederal, upon the plea of the Patron by it ſelf, and upon the plea of the Incumbent by it ſelf.

Hill. 30. Eliz. in the Common Pleas:

C X C I. *Mallet and Ferrers Case.*

In a Treſpaſſe of Battery; the parties were at Iſſue upon, Not guilty, and Lat the Niſi prius it appeared, that the thumb of the right hand of the Plaintiff was clean cut off, and ſo maimed; And it was found for the Plaintiff, and damages taxed to forty pounds, and now the party came in perſon into Court, and prayed, in reſpect of the heynouſneſſe of the Wound, that the Court would encrease the damages; which damages, upon great conſideration had, were made one hundred pounds, and Judgement given accordingly. See that the cutting of any of the fingers is a Wound, 28 E 3. 54. by Stone; and as for the damages further aſſeſſed by the Court, then the damages taxed by the Jury, See Book Entries, 46. 8 H 4. 135. 39 E 3. 20.

Damages increased of a Mayhime by the Court.

Hill. 30. Eliz. In the Common Pleas.

C X C II. *Atkins and Hales Case.*

Richard Atkins of Lincolnes-Inne brought a Writ of Forger of falſe Faits againſt Hale of Glouceſter, and counted upon the forger of an Indenture, in quo continetur quod quidam Abbas Monasterii de Glouceſter Demisit ſciturum Manerii de R, & terras dominicales, &c. The Defendant pleaded, Not guilty. And it was given in evidence on the Plaintiffs part, a Leaſe ſuppoſed to be made and forged, containing that the ſaid Abbot leaſed the ſaid Write,

Forger of falſe faits.

and all the demesne Lands of the said Hamor, exceptis duobus seperatibus clausuris inde, &c. vocat. &c. And it was moved, if this Evidence doth maintain the Issue. And it was holden by the whole Court, that the Evidence was good enough, for it is not necessary to construe terras Dominicales, omnes terras Dominicales, for the Lands not excepted are terras Dominicales, and so the Count is satisfied by that Evidence, &c.

Hill. 30. Eliz. In the Common Pleas.

CXCIII. Chamberlaine and Stauntons Case.

Deeds, and
sealing of
them.

Chamberlaine brought Debt upon an Obligation against Staunton, and upon non est factum, the Jury found this special matter, that the Defendant subscribed and sealed the said Obligation, and cast it upon a certain table, and the Plaintiff took it without any other delivery, or any other thing amounting to a delivery. And the Court was clear of opinion, that upon that matter the Jury had found against the Plaintiff, and it is not like the case which was here lately adjudged, that the Obligor subscribed and sealed the Obligation, and cast it upon a table, saying these words, this will serve, the same was holden to be a good delivery, for here is a circumstance, the speaking of these words, by which the Will of the Obligor appeareth, that it shall be his deed.

Hill. 30. Eliz. In the common Pleas.

CXCIV. Oldfeild and Willmers Case.

Arbitrament.

If Debt upon an Obligation, the Defendant pleaded, that the Obligation was endowed with condition, that the Defendant should stand to the Award of 1 S. &c. who awarded, that the Defendant should pay to the Plaintiff at such a day 100 li. or should find two sufficient sureties to be bound with him to the Plaintiff to pay the said 100 li. to the Plaintiff, by twenty pounds a year, until the whole sum be paid; and pleaded further, that he had performed the said Award. The Plaintiff by Replication saith, that the Defendant hath not paid unto him the said one hundred pounds, and so in that assigned the breach of the Award, and upon the Replication the Defendant doth demurre in Law, because by the pretence of the Award, the Defendant had election either to pay the one hundred pounds at the day, or to find two sureties for the payment of it by twenty pounds per annum, &c. for so is the Award in the disjunctive. But the Court was clear of opinion, that the Replication was good, for although that the Award be set down and conceived in words disjunctive, yet in Law and in substance it is single, for as to the finding of Sureties the Award is void, and so nothing is awarded but the payment of the one hundred pounds at the day to which the Plaintiff in his Replication hath fully answered: And Judgement was given for the Plaintiff.

Hill. 30. Eliz. In the common Pleas.

CXCV. The Lord Dudley and Lacyes Case.

Audita querela.

The Lord Dudley brought an Audita querela against Lacy, and upon it a Scire facias against the same party; And at the day it was moved by the Council of Lacy, that in as much as no execution was sued against the person of the Lord upon the Statute Staple, in which the said Lord was bounden to the

the said Lacy, so as he was not in prison, a Scire facias ought not to issue, but a Venire facias. And the Court was clear of opinion, That it is at the election of the party grieved which of them he will sue, scil. a Scire facias, or a Venire facias. See 15 E 4. 5. by Choke, Scire facias and Venire facias are all one in effect: Another matter was moved of the part of Lacy; That this Audita Querela ought to be sued in the Chancery and not in the Common Pleas. But the Court was clear of opinion, that the party might sue in which of the Courts he would. See 16 Eliz. Dyer 332. An Audita Querela upon a Statute Merchant directed to the Justices of the Common Pleas; but upon a Statute Staple, the Suite shall be in the Chancery by Audita Querela directed to the Chancelloz, or by Scire facias directed to the Sheriff, quod sit in Cancellaria, &c.

Hill. 30. Eliz. in the common Pleas.

CXCVI. Askewe and the Earle of Lincolnes Case.

Askewe was bound to the Earl of Lincoln in a Statute Staple, the Earle sued execution, by which Askewe was put in prison; and now the friends of Askewe offered the money in Court, and cast an Audita querela for Askewe, and prayed he might be bailed, and the money remain in Court till the Audita Querela determined. But the Earl presently demanded the money to be delivered to him, but the Court denied it, and commanded the Detainethozles to keep the money, until the Audita querela were determined: And let Askewe to bail for the costs of suite.

Trin. 31. Eliz. in the Kings Bench.

CXCVII. Ward and Blunts Case.

Ward brought an Action of Trover and Conversion against Blunt of 2000 ty loads of Corn: as unto twenty loads the Defendant pleaded not guilty, and as to the residue a special plea, upon which the Plaintiff did demurre in Law, and it was adjudged for the Plaintiff, upon which issued a Writ of Enquiry of damages; which is returned: It was moved, that the Writ of Enquiry of Damages ought not to have issued forth, for the Issue both yet depend unttryed, and the book of 34 H 6. 1. was touched, and there the case was, that in Trespasse against many, one of them made default after a plea pleaded. Now a Writ of Enquiry of Damages shall be awarded, but shall not issue forth until the plea of the others be tryed, and if the Issue be tryed for the Plaintiff then the Enquest who tryed the Issue shall assesse damages for the whole, and if for the Defendant against the Plaintiff, then the Writ which was awarded to issue forth. See 44 E 3. 7. Cook, it is in the discretion of the Court, to award such Writ or not, which Wray granted, but it is usual here to grant the Writ presently: Gawdy, the case in 39 H 6. is not like this case, for in this case the Trespasse is divided, and as it were apportioned in twenty loads, and twenty loads, but in the other case not.

Trover and Conversion.

Trin. 31. Eliz. Rot. 666.

CXC VIII. Smith and Bustards Case.

[An Ejectione firmæ it was found by special verdict, that one S was seised of Lands, and leased the same to F for one and thirty years, yeilding and paying

ing twenty pounds per annum at the Font-stone in the Temple Church (the land it self lying in Essex) upon the feasts of the Annunciation of our Lady and Saint Michael, or within twelbe dayes after either of the said feasts, by even portions, upon condition, that if the said Kent or any part thereof be unpaid by the said space of twelbe dayes, Proxime post aliquod festorum vel dierum solutionis inde, that then it should be lawful for the Lessor to re-enter. T assigned his interest to Bustard the Defendant, at Michaelmas the Kent is behind, and the twelfth day after the Lessor demanded the Kent at the Temple Church; and for not payment thereof re-entered: Towse, the re-entry of the Lessor was not lawful, for by the said Reservation the Kent was not due until the twelfth day after Michaelmas, for before that he cannot have an Action of Debt, or distress for it, and these words (dierum solutionis) are greatly material, for conditions are obvious in Law, and if the words thereof be doubtful, they shall be construed for the avail of him who is bound by it. As in the case of 28 H 8. 17. If I be bound to you upon condition, to pay to you before the feast of Saint Thomas twenty pounds, if there be in one year two feasts of Saint Thomas, the latter feast shall be my day of payment. Wray, this Kent is not due until the last day of the twelbe dayes, for neither debt or distress lieth for it, then the day of payment mentioned in the condition ought to be the last day of the last twelbe dayes, and dict. spatium shall be construed the same number of dayes, and not the same dayes. And at last it was resolved and abindged, that the entry of the Lessor was not congeable, but he ought to expect the latter day of the twelbe dayes.

Conditions
expounded li-
berally for the
party who is
to perform it.

Trin. 31. Eliz. in the Kings Bench.

CXCIX. *Sir George Farmer and Brookes Case.*

Prescription.

In an Action upon the Case the Plaintiff declared, that time out of mind, &c. there had been a Mannor called Tocester, and also there had been there a Town called Tocester, and that all the Messuages, Lands and Tenements within the said Town had been holden of the said Mannor, and that he is Lord of the said Mannor, and that he, and all those whose estate he hath in the said Mannor, have used to have a Bake-house, and a Baker, to bake white bread and house bread for all the Inhabitants and Passengers there, which bread hath been of a reasonable Assize and price, and sufficient for all the Inhabitants and Passengers there (but doth not say wholsom) and that time out of mind, &c. no person had had or used any Bake-house there, but by the appointment of the said Lord of the Mannor for the time being: But that now the Defendant had erected a Bake-house unto the Nuisance of the Plaintiff: The Defendant shewed, that at the time he had set up his Bake-house there were three Bakers there; and shewed, how that he was Apprentice to the Trade, and that at the time, he set up the said Bake-house for the benefit of all persons, as it was lawful for him to do. Morgan, the matter only is, if this prescription made by the Plaintiff be good or not: It is to be considered, if all prescriptions at the Common Law are one, and if all prescriptions be guided by one rule and line: And I conceive, that prescription at the Common Law is but one: And there are two points in prescriptions, Usage and Reasonableness, but they are not guided by one line, for some prescriptions are against strangers, and then there ought to be consideration and recompence: Some prescriptions against privies as between Lord and Tenant, for there the Tenure is sufficient, & volenti non fit injuria. For the first, see 5 H 7. 9. where in Trespass the Defendant doth justify, that the place where, is his free-hold, and that he had a Foldage, and that he, and all those whose estate he hath, &c. have used, that if any man or pasture his

his Sheep with the Sheep of the Defendant for the day time, that it was lain, full at night to take all the Sheep and put them in his fold all the night and in the morning to put them out; and the same was holden a good prescription, for which the Plaintiff traversed the prescription: And for the other see 11 H 7. 13, 14. 21 H 7. 40. between Lord and Tenant, that every Tenant for every pound-breach should forfeit three pounds, and see the Prioz of Dunstable case, 11 H 6. 19. Br. prescription 98. The Prioz declared, that he and his Predecessors time out of mind, &c. had had a Market in D every week one day, and that Butchers and others, who sold victuals, should sell the same in the high Street, upon Stalls of the Prioz to them assigned, and that the Prioz should have one penny for every Stall every day; and shewed, that the Defendant had sold in his house, whereby the Prioz had lost the advantage and profit of his Stalls there. And the same was holden a good prescription. And on the other side, the Defendant did prescribe, that he and all house-holders of D had used to sell in their houses: The same was holden a naughty prescription. See 43 E 3. 5. and see also suit ad molendum upon prescription without tenure, for peradventure he had not any Mill there before, and now it is an ease to the neighbours: Vide Register 107, where the Will is, Cum querens habeat ratione Domini sui apud R. eadem libertatem quod nullus in eadem villa uti debent seu consuever. Officio, sine Mysterio tinctoris sine licentia ipsius querentis, the same is good by way of prescription, but is void by way of grant: And there the Defendant is forbid to use the trade of his Wyche-house within his Parance without his licence, which appeareth upon the Will which is in the Register (which Register was made by the Judgement and abuse of the great Judges of the Law) and there is remedy given for the like case, as in the case at the Wars. And see F B 122. b. Sectam ad furnam, and although such a manner of prescription should bind a stranger, yet here our case is stronger, for the Defendant is our Tenant. And Hill 15. Eliz. Rot. 166. an expresse Judgement was given in such case for the Plaintiff. Buckley contrary, although that here be a losse to the Plaintiff, yet there is not a wrong, as the case in 12 H 8. 3. If I have an acre of Land adjoining to your acre, and my acre is drowned, I may make a sluice to carry away the water, and although that by so doing your acre is drowned, yet I shall not be punished for it, because it is lawful for me to make a trench in my own Land, and then if it be any Nuisance to you, you may make a trench in your ground, and so carry away the water until it come to a River or ditch. See the case 11 H 4. of School-masters 200. for it is damnum absque injuria. And it is against the liberty of the Common-wealth, that liberty of Contracts be not free but restrained with Privileges to one only: Vide 22 H 6. 14. If one erect a Mill neer to my Mill, no Action lyeth against him, for it is for the use of the Kings Subjects, and God forbid, that Bread and the baking of it should be restrained to any special person, especially in a Market Town. And as to the case of the Prioz of Dunstable, that is not to the purpose, for there he prescribed to have a Market and the correction of it; and the fault there is not in the usurping of a Market in Nuisance of the Plaintiff, but cause the Defendant sold meat there secretly, so as the Plaintiff could not have the correction of it. See 22 H 6. 14. And it is not reasonable, that such profits be restrained and drawn from the publick good to the private commodity of any person. And he cited a case which was ruled in the Exchequer 9 Eliz. upon an Information exhibited there by the Burgesses of Southampton, that the King had granted to the Burgesses of Southampton, that all the sweet Wines brought within the Realm should be unladen at Southampton only: And it was agreed by the good Lord Wray, that such a grant was not good to deprive the Common-wealth of such a benefit, and to appropriate it to one, which might be profitable to many: And it was further said by the Lord Wray, that if the King will grant by his Letters Patents, that A B shall be of counsel only with the Defendant in the Chan-

Grant of the
King void.

cety, and C B with the Plaintiffs in the Exchequer Chamber, the same is no good grant, &c.

Trinit. 31. Eliz. in the Kings Bench. Intrat. Hill. 31. Kor. 31.

C C. Park against Mosse and How.

Trover and
Conversion.

In an Action upon the Case upon Trover and Conversion. The Defendant pleaded, that one A recovered in Debt against I P Executor of E P one hundred pounds and twenty pounds in Damages: The debt of the goods of the Testator, and the damages of the goods of the Testator, si quæ fuerint, and if not, of the goods of the Executor. Upon which A procured a Fieri facias directed to the Sheriff of N who made his Warrant to the Defendants to execute the said Writ. And before Execution I P dyed intestate, and administration was committed to the Plaintiff, and the Defendants afterwards did execution of the proper goods of I P, and sold them, and deliver the money to the Sheriff, which is the same Trover and Conversion, and averred that E P had no other goods. The Plaintiff by Replication said, that the Sheriff upon the return of the said Writ of Execution, returned as to the principal debt, that the goods of the Testator were wasted; and as to the damages, that he could not execute the Writ quia carde.

Tanfield, I conceive that the false return of the Defendant shall not make the Defendant punishable, for they did execution, secundum exigentiam brevis, and delivered the moneys coming thereby to the Sheriff; and if they should not be excused it should be a great inconvenience, for it is necessary that the Sheriff have inferior Officers under him. As 37 H 6; an Executor named in the Will, named one to take the goods of the Testator in such a place, who did accordingly, and afterwards the Executor doth refuse; yet the servant shall not be punished for that meddling, 13 H 7. 2. 21 H 7. 23. Where it is said by Read chief Justice, that if the Bayly delivereth the body of one who he hath taken in Execution to the Sheriff, he shall be excused, although that the Sheriff doth not return the Copias; and we have pleaded in this case, that we have delivered the money to the Sheriff, and that is confessed by the demurrer. Aleham, I conceive that this Execution after the death of the party is not good. For an Administrator is another person, wherefore new process shall issue against him, as in all cases where the person is changed: 18 E 3. If one sueth a Certificate out of a Statute, and before execution had he dyeth, his Executors shall not have execution upon that Certificate, but first they ought to have a Scire facias: And 28 H 8. Dyer 29. Transcript of a Fine is removed by the Ancestors out of the Treasury into the Chancery, and comes in by Mitimus to have execution, and the Ancestors dyeth before Execution. Now the Heir cannot proceed without a new Mitimus, for he is another person. See 36 H 8. Br. Statute Merchant 43. and in our case here, at the time of the Execution these are not the goods of the Executor, for he is not in esse, and it ought to appear whose goods they are which are taken in Execution: If Lands be recovered against the Father who dyeth, and the Heir be ousted by Execution, without a Scire facias against the Heir, he shall have an Assize. And 6 E 6. Dyer 76. is our case. A is condemned in Debt, and a Fieri facias is awarded, and before execution A dyeth intestate: The Sheriff leyed the Debt upon the goods of the Intestate in the hands of the Administrators; upon which the Administrators brought Error and reversed the Execution. Tanfield, the Execution is erroneous, but is not void, but shall stand until it be reversed by Error. And it was holden by the whole Court, that the false return of the Sheriff should not prejudice the Defendants: At another day it was moved again, and it was holden, that the averment, that the goods put in Execution

Execution were the goods of the Testator the day of the Writ of Execution sued, was a good averment without saying, The day of Execution done, for the award of the Writ of Execution shall binde all his goods against whom the Judgement was given which he had at the day of the Writ of Execution awarded. And it was also holden, That notwithstanding the death of the party against whom, &c. The Sheriff might do execution of the goods of the dead in the hands of his Executors according to the opinion of Bryan. 16 H. 7. 6. Execution against an Administrator, after the death of the Intestate of the intestate goods; good Execution shall relate to the date of the Writ.

Trin. 31. Eliz. In the Kings Bench.

CC I. Carie and Denis Case.

The Case was; Upon a Latitat, the Sheriff returned, That by vertue of the said process he had arrested the Bodie of the Defendant, and that such a day after, and befoze the Return of the Latitat, a Habeas Corpus came to him to bring the bodie immediately into the Chancery, which was done accordingly, and there the Prisoner was discharged by the Order of the said Court: and the same was holden a good Return, for the Sheriff is bound to obey the Kings Writs, and to execute them, and he cannot compel the partie to put in Sureties to appear here: and the truth was, That the party was brought befoze the Master of the Rolls, and he did discharge him. And per Curiam, the same is no offence in the Court, but it was an ill act of the Master of the Rolls. For we oftentimes have persons here upon Habeas Corpus who are also arrested by Process out of the Exchequer, or of the Common Pleas, but we will not discharge them befoze they have found Sureties for their appearance, &c. and so the said Courts use to do reciprocally: and we cannot punish the Sheriff, for the Habeas Corpus was first returnable befoze the Latitat, but the party may have an action against the Sheriff, but we will speak with the Master of the Rolls, &c. and afterwards Bail was put in: But afterwards another Exception was taken to the Return: sci. a custodia nostra exoneratus fuit, which might be intended as to the Cause in the Chancery only, and not for the Cause here, for he hath not alledged, that he hath not alledged, That he was committed to any other in custodie, and for that cause day was given to the Sheriff to amend his Return. Return of the Sheriff.

Trin. 31. Eliz. In the Kings Bench.

CC II. Upton and Wells Case.

In an Ejectione firmæ by Upton against Wells, Judgement was given for the Plaintiff, and upon the habere facias possessionem, The Sheriff returned that in the Execution of the said Writ he took the Plaintiff with him, and came to the house recovered, and removed thereout a woman, and two children, which were all the persons which upon diligent search, he could finde in the said house, and delivered to the Plaintiff peaceable possession to his thinking, and afterwards departed, and immediately after three other persons which were secretly lodged in the said house expelled the Plaintiff again: upon notice of which he returned again to the said house to put the Plaintiff in full possession, but the other did resist him, so as without perill of his life, and of them that were with him in company he could not do it. And upon this Return the Court awarded a new Writ of execution, for that the same was no Execution, of the first Writ, and also awarded an attachment against the parties.

*Trin. 31. Eliz. In the Kings Bench.*CCIII. *Marsh and Astreys Case.*

Tryall.

MArsh brought an Action upon the Case against Astrey, and declared, That he had procured a Writ of Entry sur disseisin against one A. and thereupon had a summons for Lands in London, and delivered the said Summons to Astrey being under Sheriff of the same County; virtute cujus, the said Astrey summoned the said A. upon the Land, but notwithstanding that did not return the said Summons; Astrey pleaded. Not guilty. And it was tryed in London, where the action was brought for the Plaintiff, and it was moved by Cook in arrest of Judgement, That here is a mis-tryal, for this issue ought to be tryed in the County where the Land is, because that the cause is local; but the Exception was not allowed, for the action is well layed in London, and so the tryal there also is good. Another Exception was moved because the action ought to be against the Sheriff himself, and not against the Under Sheriff, for the Sheriff is the Officer to the Court, and all Returnes are in his Name, and I grant that an action for any falsity or deceit lyeth against the Under Sheriff, as for embeselling, raising of Writs, &c. but upon Non feassans; as the Case is here, the non Return of the Summons, it ought to be brought against the Sheriff himself. See 41 Ed. 3. 12. And if the under Sheriff take one in Execution, and suffereth him to escape debt lyeth against the Sheriff himself. Another Exception was taken because the Declaration is that the said Astrey Intendens & machinans ipsam querent. in actione sua predict. prosequend. impedire, &c. did not return the said Summons but doth not say, tunc exist. Under Sheriff. Snag, contrary, If a Waple Errant of the Sheriff, take one in Execution, and he suffer him to escape, an action lieth against the Waple himself. And that was agreed in the Case, of a Waple of Middlesex, and Sir Richard Dyor Sheriff of Huntington, and his Under Sheriff, who suffered a Prisoner to escape, and the action was brought against the Under Sheriff; for it may be the Sheriff himself had not notice of the matter, because the Writ was delivered to the Under Sheriff, and he took a fee for it, and therefore it is reason that he shall be punished. As if a Clerk in an Office mis-enter any thing, he himself shall be punished, and not the Master of the Office, because he takes a fee for it. But if the Return made by the Waple be insufficient, Then the Sheriff himself shall be amerced, but in the principal case it is clear, That the action lyeth against the Under Sheriff if the party will, and such was the opinion of Gawdy and Clench: As to the other matter, because it is not alledged in the Declaration, That the Defendant was under Sheriff at the time, The Declaration is good enough notwithstanding that, for so are all the Presidents, and if the Defendant were not under Sheriff the same shall come in of the other side. See 21 E. 4. 23. And afterwards in the principal Case, Judgement was given for the Plaintiff.

*Trin. 31. Eliz. In the Common Pleas.*CCIV. *Hedd and Chaloners Case.*

In an Ejectione firmæ by Hedd against Chaloner upon a Demise for years of Jane Berd, It was found by especial Verdict, That William Berd was seised in fee, & made a feoffment to the use of himself for life, and afterwards to the use of his two daughters Joan and Alice in fee, and dyed, and Joan en-
tred

tres into the Land, and by Indenture by the name of Jane Berd, leased the same to the Plaintiff for three years. And it was further found, That Joan intended in the feoffment, and Jane who leased, are one and the same person; Wray, It hath been agreed here upon good advice and Conference with Gram- marians, that Joan and Jane are but one Name. And Women because (Joan) seems to them a homely name, would not be called Joan but Jane: But ad- mit that they were several Names, When he and Gawdy were of opinion, it should not be good: But afterwards, it was said by Gawdy, That this action is not grounded merely upon the Indenture, but upon the Demise, and that is the substance, and the Indenture is but to enforce it, sci. the lease, 44 E. 3. 42. Another matter was moved here, the remainder was limited to Joan and Alice in fee, by which they are Joint Tenents, and then when one of them enters, the same vests the possession in them both; When by the demise of Joan a moiety passeth only to the Plaintiff. Wray, Here the Term is in- curred, and the Plaintiff is to recover damages only, and no title at all is found for the Defendant, and so there is no cause but that Judgement should be given for the Plaintiff: and thereupon Judgement was given for the Plaintiff.

Trin. 31. Eliz. In the Kings Bench.

CCV. Read and Nashes case.

In an action of Trespass by Read and his Wife against Nash, for entering into a house called the Dayry-house, upon Not guilty pleaded, The Jury found this special matter, Sir Richard Gresham Knight, was seised in fee of the Mannours of J and S and of diverse other Lands mentioned in his Will, and 3 Edw. 6. devised the same to Sir Thomas Gresham his Son for life, the Remainder to the first son of the said Sir Thomas Gresham in tail. the Re- mainder to the second son, &c. the Remainder to the third son, &c. The Re- mainder to Sir John Gresham his brother; Proviso, That if his Son go a- bout or make any Alienations or discontinuance, &c. whereby the premises cannot remain, descend and come, in the form as was appointed by the said Will, otherwise then for Joyntures for any of their Wives for her life only or leases for 21. years, whereupon the old and accustomed Kent shall be re- served, That then such person shall forfeit his estate, Sir John Gresham dy- ed: Sir Thomas Gresham his son, built a new House upon the Land: and, 4 Marie, leased to Bellingsford for one and twenty years, renewing the an- tient Kent. And afterwards 2 Eliz. he leavied a fine of the said Mannours and of all his Lands: and 5 Eliz. he made a Jointure to his Wife in this manner, sci. He covenanted with certain persons to stand seised to the use of himself, and his Wife for their lives, and afterwards to the use of his Right Heirs, and afterwards, 18. Eliz. he leased unto Read and his wife for one and twentie years to begin presently (which was a year before the expira- tion of the said Lease made unto Bellingsford,) which Lease being expired, Read entered. It was argued by Cook, That here, upon the words contain- ed in the Proviso, Sir Thomas had power and authority, not being but Te- nant for life to make a Lease for years, or Jointure, and that upon implica- tion of the Will, which ought to be taken and construed according to the intent of the parties; for his meaning was to give a power, as well as an estate, otherwise the word (otherwise) should be void; and it is to be obser- ved, That the parties interested in the said conveyance were Knights, and it is not very likely, That the said Sir Richard Gresham did intend, that they should keep the Lands in their own manurance as Husbandmen, but let the same to Farm for Kent. And it is great Reason, although he willed

that the order of his Inheritance should be preserved, yet to make a Provision for Jointure; and it is great reason and cause to his family to enable and make them capable of great Estates, which should be a strengthening to his posterity, which could not be without great Jointures, wherefore I conceive it reasonable to construe it so, That here they have power to make jointures for their Wives. It hath been said, That no grant can be taken by implication, as 12 E. 3. sic avoc. 77. Land was given to I and A his wife, and to the heirs of the body of I begotten: and if I and A dy, without heir of their bodies, betwixt them begotten, that then it remain to the right heirs of I, and it was holden that the second clause, did not give an estate tail to the wife, by implication being in a grant, but otherwise it is in Case of a devise, as 13 H. 7. 17. (and there is no difference (as some conceive) when the devise is to the heir, and when to a stranger) but these cases concern matter of Interest, but our case concerns an Authority: and admit that Sir Thomas hath power and authority to make this lease, Then we are to consider if the Jointure be good, for if it be, Then being made before the Lease, it shall take effect before, and the woman Jointresse is found to be all void. But I conceive, That this Jointure is void, and then the Lease shall stand, for an use cannot rise out of a power, but may rise out of an estate of the Testator, and out of his Will, 19. H. 6. A man deviseth, That his Executors shall sell his reversion, and they sell by Words, it is a good Sale, for now the Reversion passeth by the Will. But an use cannot be raised out of an use, and a man cannot bargain, and sell Land to another use then of the Bargainee. And it is like unto the case of 10 E. 4. 5. The disseisor doth release unto the disseisor rendring Kent, the render is void, for a rent cannot issue out of a right, so an use cannot be out of a release by the disseisor, for such release to such party shall not enure as an Entry and feoffment: Also here after that conveyance. Sir Thomas hath built and erected a new house, and no new Kent is reserved upon it, & therefore here it is not the ancient Kent, for part of the sum is going out of the new house. But as to that, It was said by the Justices, do not speak to that, for it appears that the Kent is well enough reserved. Another matter was moved for that, That a year before the Expiration of the Lease made to Billington this Lease was made to Read, for 21. years to begin presently from the date of it: although by the same authority he cannot make Leases in Reversion, for then he might charge the Inheritance in infinitum. But yet such a Lease as here is he might make well enough, for this Lease is to begin presently, and so no charge to him in the Reversion, as in the Case, betwixt Fox and Colliers, upon the Statute of 1 Eliz. A Bishop makes a Lease for three years before the Expiration of a former Lease to begin presently, It was holden a good Lease to bind the Successor for the Inheritance of the Bishop is not charged above one and twenty years in toto. But if a Bishop make a Lease for years, and afterwards makes a Lease for three lives, the same is not good, 8 Eliz. Dy. 246. Tenant in tail leaseth to begin at Michaelmas, next ensuing for twenty years, it is a good Lease by the Statute of 32 H. 8. so is a lease for 10 years, and after for eleven years, and yet the Statutes are in the Negative, but this power in our Case is in the Affirmative; and the Inheritance is not charged in the whole with more then one and twenty years.

Trinit. 31. Eliz. In the Kings Bench.

CCVI. Kinnerly and Smart's Case.

Debt upon a
usurious Con-
tract.

In Debt upon a Bond, The Plaintiff declares, That the Bond was made in London; The Defendant pleaded, That an usurious Contract was made

made betwixt the parties at D in Stafford-shire, and that the Obligation was made for the same contract. The Plaintiff by Replication saith, that the Bond was made bona fide, & non pro usura, and that Juss was tried in the County of Stafford, and was found for the Plaintiff: And it was moved in arrest of Judgement, that that Juss ought to be tried in London, where the contract was made. Cowdy conceived, that the trial is well. As 8 E 3. 8. In debt upon an Obligation in London, the Defendant pleaded, that the Obligation was made by duress at York, the same Juss shall be tried at York. At another day the case was put more certain, scilicet, that the contract was made at W in Stafford-shire, by which it was agreed, that for a Horse and two Ton of Iron, the Plaintiff should have for them and the forbearing of the money for such a small time fifty pounds; whereas in truth they were but of the value of forty pounds, and that the said Bond was made for the payment of the said fifty pounds. Cook, Trial, the Juss is well tried, for the ground of the matter is the usurious contract, and those of Stafford-shire may better know it then they of London. And according to this Trial it hath been before adjudged. H 18. Eliz. rot. 209. Betwixt Sybthorpe and Turner. And P 31. Eliz. rot. 303: betwixt Pryne and Wilkenfon, where the Juss was, absque hoc, that it was a corrupt agreement, but the pleading was, ut supra. And afterwards Judgement was given for the Plaintiff.

Trin. 36. Eliz. in the Kings Bench.

CCVII. The Queen and Buckberds case.

The Queen recovered against Buckbeard in a Quare Impedit; and thereupon a writ of Error was brought, and it was assigned for Error, that the Queen, post tempus semestris, had Judgement to recover damages for the value of the Church of half a year: Cook, the same is no Error as it was adjudged, 7 Eliz. 236. See also 34 H 1. 51. And these damages are not as damages, but as a penalty inflicted upon the disturbance. See Book Entries, 483. The King in a Quare Impedit counted to his damage of forty pounds, and 484. 000 li. and although tempus semestris transierit, yet the King shall recover damages, but the value of the Church for half a year, for the King at all times may present in his own right; for nullum tempus occurrit Regi. At another day it was moved by Fenner Serjeant, and he conceived, that here the Queen is not to recover damages, for she doth not present in her own right, for the Incumbent had two Benefices without Qualifications, and therefore the first was void, and the Lapse entured, and therefore the Queen did present in the right of the Crown, and so is not verus Patronus. 14 E 3. Quare Impedit 54. The King shall not recover damages, although he count of damages, 3 H 6. Damages 17. And as to the case of 7 Eliz. it doth not appear there, that the King did present by reason of his Prerogative, and he shewed divers Presidents, that the King shall not recover damages in such case. P 7 H 3. rot. 402. 2 H 6. rot. 310. For the Statute was intended to give damages to the very Patron, and not otherwise. Cook, where the King presents by Lapse he is verus Patronus hac vice, as Grantee of the next Avoidance: Vide T. E 1. Quare Impedit 181. The King recovered damages in the case of a Prior. Godfrey said, he had searched the Roll of 7 Eliz. and there is more reported in the Book then is in the Roll, for Judgement is given for the Presentee, but as for the damages, the Court would advise of it. Cowdy, it is clear, that the Queen shall not recover double damages, for she cannot lose her presentment, quia nullum tempus occurrit, and because, eo quod tempus semestris transierit, but she shall have single damages, for they are given

Quare Impedit.

Damages in a Quare Impedit whereby King, &c. can sue.

Where only single damages are given

given for the wrong and disturbance, and not for the presentment; and therefore the damages are well awarded. Wray, If the King be not within one part of the Statute. (as it is agreed as to the double damages) it is hard that he be within the other branch.

Popham Attorney general, The Queen ought to recover damages, but only single damages, but not double damages, and the words of the Statute are general, therefore the Queen shall have the benefit of it, and of all Statutes made for the benefit of the subjects, the King shall take advantage: The Statute of Gloucester gives damages in a Writ of Coverture, Aiel, and Be-fail, and the King brings an Action upon the seizure of his Ancestors, he shall recover damages, and in construction of Statutes, the opinions of them which were next to the making of them is to be much respected: Vide 19 E. 2. rot. 90. 19 E. 1. rot. 355, 231, 136. And alwayes the King counts to his damage, &c. and that should be in vain, if he should not recover damages: And as to the Presidents shewed to the contrary, that was the default of those Clerks which the King had presented, and when in a Quare Impedit the King had prevailed, they contented themselves with the Incumbency without regard of the damages: But if damages be not to be given, yet the Judgement to recover the presentment is not erroneous. And the Judgement only as to the giving of damages shall be reversed, and the Defendant in the Quare Impedit here shall not assign the same for Error, because no damages are given, for it is for his advantage. And alwayes where it is found for the Queen in a Quare Impedit, they enquire of the value of the Church, which should be a frivolous thing, if the Queen should not recover damages. Gawdy, of things transitory the Queen may be disturbed, and if she be, wherefore shall she not recover damages: but the doubt is, if the intent of the Statute be, if the party shall have single damages in any case: And here in this case the Judgement is one and entire, and if it be reversed in part it shall be reversed in the whole; as in Dower, the Tenant pleads, that he is alwayes ready, &c. the Demandant shall have Judgement to recover her Dower, and a Writ shall issue forth to enquire of the damages. And see also 17 E. 3. In an Assize of Dorein presentment, the Plaintiff had Judgement to have a Writ to the Bishop: And the Assize was taken after for the damages: And in the mean time the Defendant brought a Writ of Error, and it was holden maintainable, for they are several Judgements; but it is not so here, for the Entry is, Quod querens habeat bre. Episcopo, & quia nescitur quæ damna, &c. for it is one Judgement.

Wray, It is but one Statute, and therefore it shall be construed with one construction, and it should be a strange construction, that the King should be within one part of the Statute, and out of the other. And 34 H. 6. 3. The Kings Attorney could not have damages, which is a great proof and authority, that the Judgement for damages in such case is Error: The experience and usage of Law is sufficient to interpret the same to us, and from the time of E. 3. until now, no damages have been given in such case. Twice this matter hath been in question, 1. 3 H. 9. and the Justices there would not give damages; 34 H. 6. there the Council learned of the King, could not have damages for the King. And 7 Eliz. there was no damages: And whereas it hath been said, that a man shall not have a Writ of Error, where Judgement is given for his benefit, that if Judgement be entered that the Defendant be in Maner, where it ought to be, Capiatur, yet the Defendant shall have a Writ of Error: And he conceived also, that here is but one Judgement: Clench, the first President after the making of that Statute was, that damages were given for the King in such case; but afterwards the practice was alwayes otherwise, and that the said Statute could not be construed, to give in such case damages, and the reason was because the Justices took the Law to be otherwise: And the King is not within the Statute of 32 H. 8. of buying of Wythes, nor any

A man shall
not assign for
error, that
which is for
his advantage.

Subjects

Subjects who buyeth any title of him : And here in our case, the Queen is not verus Patronus, but hath this presentment by Prerogative : And if title do accrue to the Bishop to present for Lapse, yet the Patron is verus Patronus.

At another day the case was moved, and it was said by Wray, that he had conferred with Anderson, Manwood, and Periam, who held, that the Queen could not have damages in this case, but Periam somewhat doubted of it. Gawdy, in 12 E 4. 46. In Dower the Demandant recovered her Dower, and damages by verdict, and afterwards for the damages the Judgement was reversed, and stood for the Lands. Clench, it shall be reversed for all, for there is but one Judgement. And afterwards Judgement was given, and that the Queen should have a Writ to the Bishop and damages. Popham, The Court ought not to proceed to the examination of the Errors, without a Petition to the Queen, and that was the case of one Mordaunt, where an Infant he sued a fine to the Queen, and thereupon brought a Writ of Error, and afterwards by the Resolution of all the Judges, the proceedings thereupon were stayed. See 10 H 4 148. a good case.

Trin. 31. Eliz. in the Kings Bench.

CCVIII. Chapman and Hursts Case.

BETWIXT Chapman and Hurst the Defendant did libell in the spiritual Court, for Tythes against the Plaintiff, who came and furnished, that whereas he held certain Lands by the lease of Sir Ralph Sadler for term of Tythes, years within such a Parish, that the now Defendant being Farmor of the Rectory there : The Defendant, in consideration that the Plaintiff promised and agreed to pay to the Defendant ten pounds per annum, during the Term, for his Tythes, he promised, that the Plaintiff should hold his said Land without Tythes, and without any sute for the same, and thereupon prayed a Prohibition : And by Gawdy, the same is a good discharge of the Tythes for the time, and a good Composition to have a Prohibition upon; and and it is not like unto a Covenant. See 8 E 4. 14. by Danby.

Trin. 31. Eliz. in the Common Pleas.

CCIX Kirdler and Leverages Case.

IF Abovvy the case was, that A leased of Lands leased the same at Will, Lendvnyng rent ten pounds per annum, and afterwards granted eundem redditum, by another deed to a stranger for life, and afterwards the lease at will is determined. Periam was of opinion, that the Kent did continue, and although that the words be, eundem redditum, yet it is not to be intended, eundem numero, sed eundem specie, so as he shall have such a Kent, scil. ten pounds per annum : As where the King grants to such a Town, easdem libertates quas Civitas Chester habet, it shall be intended such Liberties, and not the same Liberties, so in the principal case : Also he held, that a Kent at will cannot be granted for life, and therefore it shall not be meant the same Kent : But it was afterwards adjudged, that the Kent was well granted for the life of the Grantee.

Trin.

Trin. 31. Eliz. In the Common Pleas.

C C X. Heayes and Alleyns Case.

Cui in vita.

Demand, and
the manner of
it, in a writ.

Heyes brought a sur cui in vita against Alleyne. And the case was this, The Discontinuer of a Messuage, had other Lands of good and indefeasible title adjoining to it, and demolish and abated the said house, and built another which was larger, so as part of it extended upon his own Land, to which he had good title. And afterwards the heir brought a sur cui in vita, and demanded the house by the Name of a Messuage, whereas part of the house did extend into the Land to which he had no right. And by Periam, The Writ ought to be of a Messuage with an Exception of so much of the house which was erected upon the soil of the Tenant, as demand of a Messuage except a Chamber: And it was argued by Yelverton, That the Writ ought to abate, for if the Demandant shall have Judgement according to his Writ, then it shall be entred quod petens recuperet Messuagium, which should be Erorions, for it appeareth by the verdict it self, that the demandant hath not title to part of it; and therefore he ought to have demanded it specially, 5 H. 7. 9. parcel of Land, containing 10. Feet. 16 E. 3. Br. Mortdanc. of a piece of Land containing so much in breadth, and so much in length. And the moiety of two parts of a Messuage, and 33 E. 3. br. Entric 8. a Discontinuance of a Parsh ground made Meadow of it, Now in a Writ of Entry it shall be demanded for Meadow. Drue Serjeant contrary, and he confessed the Cases put before, and that every thing shall be demanded by Writ in such sort, as it is at the time of the action brought: as a Writ of Dower is brought of two Wills, whereas during the Coverture they were but 2 Totts; but at the day of the Writ brought, Wills; and therefore shall be demanded by the name of Wills, 14 H. 4. 33. Dower 21. 13 H. 4. 33. 175. 1 H. 5. 11. Walmesly, part of a Messuage may be demanded by the Name of a Messuage: and if a House descend to two Coparceners, if they make partition that one of them shall have the upper Chamber, and the other the lower, here if they be disseised, they shall have several Assises, and each of them shall make his plaint of a Messuage, and by him a Chamber may be demanded by the name of a house. And afterwards the Writ was awarded good but a special Judgement was given ei, quod querens recuperet Messuagium prædict. viz. so many feet in length, and so many in breadth, according to that which was found by the Verdict.

Trin. 31. Eliz. in the Common Pleas:

CCXI. Degory and Roes Case.

Debt.

Degory brought Debt upon an Obligation against Roe, as heir to his Ancestor, The defendant pleaded, That his Ancestor by his deed did covenant with Sir W. Winter, and A. Marsh, to stand seised to the use of himself for life, and afterwards to the use of the Defendant, and his heirs, and so he had nothing by descent, The Plaintiff replicando said, non convenit; and it was found by special verdict, That such a deed of Covenant was made by the Ancestor of the Defendant, but the first use was limited to the Covenantor and his wife, for their Lives, &c. And that he delivered the same to J S as his deed, to the use of the said Sir W. Winter, and the said Marsh, if the said Sir W. Winter would agree to the same, and take the charge of it upon him, and if he will not agree, That then it should not be his deed, and further

Further found, That Sir W. Winter dyed before any agreement; and it was moved by Periam, If the same be presently the deed of the Ancestor, or if it do not take effect till the condition be performed, sci. untill Sir W. Winter hath agreed to it. See 14 H. 8. 17, 18, 19, 20, 23. And by Walmesly. The Deeds, when same is not the Deed of the Ancestor untill Sir William hath agreed; But to take effect. By Anderson and Periam, although Sir William Winter doth not agree to it, yet it is the deed of Roe, for although a deed be upon condition, ut supra, yet because he delivered it as his deed, and the Condition is subsequent to it, It shall be taken for his deed, and the condition after shall be void, because repugnant: For although that in Estates limited to men, the estate may be precedent, and the condition subsequent, and the not performance of the condition may destroy the estate, for the estate is alwaies subject to the condition, yet it is not so in Deeds, for being once the deed of the party, it can never cease to be his deed, after it is once delivered as his deed. Owen, Although the same be the deed of the party, yet it is not well pleaded, and he conceived the issue is found against him, for the Covenant is pleaded, to stand seised unto the use of himself for life, the Remainder over: To which the Plaintiff Replicando saith, non convenit, so as the Issue is, if any such Deed of Covenant was, and the Jury finde, That the Covenant was to stand seised to the use of himself, and his wife, &c. so as it is not such a deed as the Defendant hath pleaded, for other estates are limited by it, and therefore it shall not be intended the same deed. Periam, The same is not materiall, for the substance of the Plea is, Nothing by descent, &c. and it was adjourned.

Trim 31. Eliz. In the common Pleas.

CCXII. The scholars of All-soules in Oxford, and Tamworths Case.

[A Writ of Right by the Colledge of All-soules in Oxford against Tamworth: the Writ was, Quod clamat tenere de nobis in liberam puram et perpetuam Eleemosinam. And exception was taken to it, because it ought to be in liberam Eleemosinam, sans pura & perpetua, also it ought to be Eleemosina, with a Double e, and not Eleemosina, with a single e, but the exception was not allowed. For as to the first Exception, it is but surplusage, and as to the other, It is the common course. Another exception was taken to the Writ, because the words are quod clamat esse jus & hereditatem suam, without saying in jure Collegii: Anderson, The Writ is good enough. If a Parson plead that he is seised, he shall say in jure Ecclesie, for he hath two capacities, and without such words here shall be intended seised in his own Right; But if an Abbot plead that he was seised, there needs not such words for he hath no other capacity, so of Dean and Chapter; Mayor and Communitie: And afterwards, the Writ was awarded good, and that the Tenant should answer over, &c. See Book Entries 236, 237. It was also moved, If the Colledge shall count of its seisin within 30. years, because that the Corporation never dyes, and then if he count of its own possession, the same is without limitation. And it was holden, that if the Guardian of the Colledge which now is, was ever seised, he ought to count upon a seisin within thirty years; But upon the seisin of his Predecessor he ought to count of a seisin within 60 years as another common person, for the change of the Wesse of such a seisin, is as the dying seised, and descent of a common person.

Writ of Right

{ The Lord Buckhurst and the
Bishop of Winchester's Case.

{ Jennings and
Winches Case.

{ Hawkins and
Lawse Case:

Trinit. 31. Eliz. in Communi Banco.

C CXIII. *The Lord Buckhurst and the Bishop of Winchester's Case.*

Quare Impedit.

The Lord Buckhurst brought a Quare Impedit against the Bishop of Winchester and counted, that he was seised of the Mannor of D, to which the Abbots-son was appendant, and that the said Church became void, and that he presented Maurice Sackvill his Clerk. The Defendant pleaded, that he was seised of the said Abbots-son, as in grosse, and presented one Maurice Sacvill, absque hoc, that the Abbots-son was appendant. It was moved, that the Defendant ought to traverse the Presentment, and not the Appendancy, especially as the cause is here, where they both present one and the same person, to which it was said, that that doth not appear, for the Defendant hath pleaded, that he presented Maurice Sackvill, but doth not say, prædict. Maurice Sackvill, so as it may be he is not the same person, but another. See 10 H 7. 27. the Traverse is well taken contrary, where the Plaintiff declares of an Abbots-son in grosse, and that he to the same presented, and the Defendant pleadeth, that he is seised of such a Mannor to which the Abbots-son is appendant, &c. without that, that the Abbots-son is in grosse, there he shall traverse the presentment, for the presentment shall make it in grosse. See 13 H 8. 12.

Trin. 32. Eliz. in the Common Pleas.

C CXIV. *Jennings and Winches Case.*

Assumpsit.

In an Action upon the Case by Jennings against Winch. The Plaintiff declared upon an Assumpsit by the Defendant, 1. Maii 32. Eliz. and counted upon a Mutuus for twenty shillings, and an Indebitatus for four pounds. The Defendant pleaded, that he being indebted to the Plaintiff in five pounds, and W S in another five pounds, they became bounden to the Plaintiff in twenty pounds for the payment of ten pounds in satisfaction of the said sum of five pounds, and five pounds, and that the Obligation was sealed before the day of the Assumpsit supposed, and added, that the same is the same debt, and that the Obligation was made for the same debt. And by the opinion of the whole Court, the same cannot be a good plea, for an Obligation cannot detain a Contract or an Assumpsit afterwards made. And the truth of the matter was, that the Obligation was made after the Assumpsit, although that the Plaintiff declared of an Assumpsit made after. And in that case it was holden, that the Defendant might plead the special matter; that the Obligation was made after the said Assumpsit, absque hoc, that he Assumpsit, &c.

Trin. 32. Eliz. In the common Pleas.

C CXV. *Hawkins and Lawse Case.*

Debr.

Hawkins brought an Action of Debt against Lawse, Executors of one A, for Rent reserved upon a Lease for years made to the Testator. The Defendant pleaded, fully administered, and upon the Evidence it appeared, that the said A made the Defendant his Executor, and that he did meddle with the possession

possession of divers goods of the Testator, and so administered, and afterwards refused in Court; and that the Administration was afterwards committed to one B, and that the Inventory of the goods of the Testator came to one thousand pounds: And it was given in Evidence for the Defendant, that he himself had paid certain debts, and that divers persons have recovered against the Administrator divers sums of money amounting to one thousand pounds, & ultra; And it was moved, if that evidence did maintain the Issue for the Defendant, because that the Defendant had pleaded, *plene administravit*, which implied an Administration by himself. And now upon the Evidence it appeareth, that the greatest part of the goods of the Testator were administered by the Administrator.

Periam, If that Administrator (who in truth is but a stranger) pay any debts with the goods of the Testator without commandment of the Executor, the same is not an Administration, and the Executor cannot give such matter in Evidence, to prove his plea of fully administered. Drew Serjeant, If an Executor of his own wrong, meddle with the goods of the Testator, and afterwards the Administrator meddle with the residue and administer them: In Debt against the Executors, who pleads fully administered; if he can prove that he himself hath administered part, and the Administrator the Residue, the same is good Evidence to maintain his Issue. Periam, It may be so there, but here in our case, the Defendant is the very Executor, and he hath administered, in which case afterwards he cannot refuse; and so the Administration is not well committed, and is granted without cause; and he to whom the Administration is committed is a meer stranger, and what he did was without warrant; and therefore it is no Administration to prove the Issue: And then the whole matter by direction of the Court was found by special verdict: And by Periam, in this case an Action may be brought, either against the Executor of his own wrong, or the Administrator, but not against both of them jointly. Sec 21 H 6. 8. by Yelverton and Porington: Periam, If the Testator mortgages a Lease for yeares and dyces; and the Executors redeem it with their own monies, the said Lease shall be Assets in their hands, for so much as the same is worth, above the sum which they have paid for the redemption of it.

Trin. 32 Eliz. in the Common Pleas.

CCXVI. Ivory and Fryes Case.

It was ruled by the whole Court in this case: That if A make B his Executor, and B makes C his Executor and dieth, and a Debt is due to A the first Testator. If C bring an Action of Debt for the said debt, as Executor to B, the Debt shall abate: It was moved, if an Infant within the age of one and twenty years makes his Executor, & administration is committed, durante minore etate, in whose name the Action shall be brought, in the name of the Infant, or the Administrator. Periam, If he will be proved before the Administration be committed, the Action shall be brought in the name of the Infant Executor.

Tinnit. 32. Eliz. In the Common Pleas.

CCXVII. Reade and Johnsons Case.

If an Action upon the Case betwixt Read and Johnson, the Plaintiff declared that where the Defendant was indebted to him, he assumed to pay it: And

Assumpsit.

upon Non Assumpsit pleaded, this special matter was found, that the Plaintiff leased unto the Defendant certain Lands for yeares, rendering rent eight pounds per annum, and that the said Rent was behind for three yeares, and that the Defendant was not otherwise indebted to the Plaintiff, nor made any other promise but the contract upon the Reservation of the Rent: And by the clear opinion of the whole Court, the Action both not lye, because he hath a proper Action, scil. an Action of Debt, in which no wager of Law lyeth.

Trin. 32. Eliz. in the Common Pleas.

CCXVIII. *Wright and the Bishop of Norwiches Case.*

Quare impe-
dit.

If a Quare Impedit betwixt Wright and the Bishop of Norwich, it was moved, if the King hath title to present for Lapse, and presents; and his Clerk is admitted and instituted, but not inducted, and dyeth before Induction. It now the King shall present for the said Lapse, because the Church was not full against the King. And the Justices were all clear of opinion, that the King might repeal such presentment before induction, and as to the principal matter, the Court seemed to incline, that the King might present again.

Mich. 30. and 31. Eliz. In the Common Pleas. Intrat. Trin. 30. Eliz. Rot. 1160.

CCXIX. *Whyskon and Cleytons Case.*

Devisers.

If an Ejectione firmæ, upon a special verdict found, the case was this, That it was leased in Fee, and devised the same to Solomon Whisker his Godson after the death of his Wife; and if he fail, then he willed all his part to the discretion of his Father, and dyed; Solomon survived, the Father being dead before without any disposition of the Land. Gawdy was of opinion, that upon those words, that the Father had a Fee-simple, as, I will that my Lands shall be at the disposition of I S, by these words, I S hath a Fee-simple, quod Periam concessit; and they amount to as much as, I will my Land to I S to give and sell at his pleasure: And by Windham and Periam, there is no difference where the Devise is, that I S shall do with the Land at his discretion, and the devise thereof to I S to do with it at his discretion.

CCXX. *Mich. 31. Eliz. in the Common Pleas.*

A leased to B for yeares, and before the expiration of the said Term leased the same by Indenture to a stranger to begin presently, and the first Lessee committed Waste. A brought an Action of Waste against the second Lessee, and declared upon a Lease made for yeares without speaking of the Indenture. And Gawdy Serjeant demanded the opinion of the Court, if the Defendant might safely plead no Waste: And they conceived, that it should be dangerous so to do. Then it was demanded, if the Defendant plead, that the Plaintiff had nothing, tempore dimissionis, whereof he had counted, if the Plaintiff might estop the Defendant by the Indenture, although he had not counted upon it, and if such Replication be not a departure. And it seemed to Periam, and Leonard, Custos brevium, that it was not, for it is not contrary to the Declaration, but rather doth enforce the Declaration.

Mich.

CCXXI. Mich. 31. Eliz. in the Common Pleas:

WAlmesley Serjeant demanded the opinion of the Court upon this matter. Land is given to Husband and Wife in special tail (during the Coverture) they have issue, the Husband is attainted of Treason and dyeth, the Wife continues in as Tenant in tail, the issue is restored by Parliament, and made inheritable to his Father, saving unto the King all advantages which were devised unto him by the Attainder of his Father, the Wife dyeth. And he conceived, that the issue was inheritable, for the Attainder which disturbed the inheritance is removed, and the blood is restored, and nothing can accrue to the King, for the Father had not any estate forfeitable, but all the estate did survive to the Wife, not impeachable by the said Attainder. And when the Wife dyeth, then is the Issue capable to inherit the estate tail. Windham and Rhodes, prima facie, thought the contrary, yet they agreed, that if the Wife had suffered a common Recovery, the same had bound the King.

CCXXII. Mich. 31. Eliz. in the common Pleas.

If an Action upon the Case the Plaintiff declared, that he had delibered to the Defendant, *diversa bona ad valentiam 10 li.* the Defendant in consideration thereof did promise to pay to the Plaintiff the debt owing, *pro bonis praedictis*, and did not shew, that the Defendant bought the said goods of the Plaintiff, and so it doth not appear that there was any debt; and then a promise to pay it, is merely void, which was agreed by the whole Court. Assumpsit.

Mich. 31. Eliz. in the common Pleas.

CXXIII. Seaman and Brownings Case.

George Seaman brought Debt upon a Bond against W Browning and Others, Executors of one Marshal; the condition was, that where the said Marshal had sold certain Lands to the Plaintiff, if the said Plaintiff peaceably and quietly enjoy the said Lands against the said Marshal, &c. and assigned the breach in this, that the said Marshal had entred upon him, and cut down five Elmes there, upon which the parties were at issue; And it was found, that A, servant of the said Marshal, by commandment of his said Master, had entred and cut, &c. in the presence of his said Master, and by his commandment, for he is a principal Trespassor; And it was so holden by the Court. Debt.

CCXXIV. Mich. 31. Eliz. in the common Pleas.

If the Kings Tenant by Knights service dyeth, his Heir within age, and upon Office found the King seiseth the body and Land, yet the Heir during the possession of the King may sell the Lands by Deed enrolled, or make a Lease of such Land, and the same shall bind the Heir notwithstanding the possession of the King; but if he maketh a Feoffment in Fee, it is utterly void, for the same is an intrusion upon the possession of the King; but where the King by Office found is entitled to the Inheritance, as that his Tenant dyeth without Heir, whereas it is false, for which the King seiseth, in such case the Tenant of the King, before his Ouster le mayne, cannot make a Lease for years,

yeares, or sell the Land by Deed enrolled : The Case depended in London before the Judges of the Sheriffs Court. The King, by colour of a false Office, which doth falsely entitle him to the Inheritance, is seised of certain Land; he who hath right leased the same for yeares by Deed indented, and then an Ouster le mayne was sued, and he enfeoffed a stranger And it was holden, that the Lease should not bind the Feoffee, although it was by Deed indented, for the Feoffee is a stranger to the Indenture, and therefore shall not be estopped by it. 18 H. 6. 22. A stranger shall not take advantage of an Estoppel, and therefore shall not be bound by it : As if one take a Lease for yeares by Indenture of his own Lands, the same shall bind him, but if he dyeth without Heir, it shall not bind the Lord in payment of Cheate.

Mich. 31. Eliz. In the common Pleas

CCXXV. Gibbes Case.

Trover and
Conversion

Gibbes brought an Action upon the Case upon Trover and Conversion of a Gelding; and the Case was, that one P had stolen the said Horse, and sold the same unto the Defendant in open Market, by the name of Lister, and the said false name was entered in the Tollbook. And it was holden clear by the Court, that by that sale the property was not altered.

CCXXVI. *Mich. 31. Eliz. in the common Pleas.*

Tenant in Socage leased his Lands for four yeares, and dyed, his Heir within the age of eight yeares, the Mother being Guardian in Socage, leased the Land by Indenture to the same Lessee for fourteen yeares; It was holden by the Court, that in this Case the first lease is surrendered, but otherwise upon a Lease made by Guardian by Purchase.

Mich. 31. Eliz. in the Common Pleas:

CCXXVII. Kimpton and Dawbenets Case.

In Trespasse, the Defendant did justice by a grant of the Land, where, &c. by Cope: The Plaintiff by Replication saith, that the Land is customary Land (ut supra) and claimed the same by a former Cope: The Defendant by Response saith, that well and true, it is, that the Lord may grant Coppes in possession at his pleasure, and also estates by Cope in Reversion, with the assent of the Copeholder in possession, but all estates granted by Cope in Reversion without such assent, have been void. It was argued, that this custom is not good, for it is not reason, that the Lord in disposing of the customary possessions of his Manor should depend upon the will of his Tenant at will, and the same is not like to the case of Attornment, for there the Attendancy is to be respited, which is not to be done here, for the Copeholder in possession shall continue Attendant to his Lord, notwithstanding such a grant in Reversion, and see for the unreasonableness of the custom, 19. Eliz. 357. in Dyer, Salfords Case: It was moved on the other side, that the Custom was good enough; and 3 H. 6. 45. wasouched, That every Freehold of a Mannor upon alienation might surrender his Land, &c. It was adjourned.

Mich.

Mich. 30. & 31. Eliz. in the Exchequer-chamber.

CCXXVIII. Marriot and Pascalls Case in a Writ of Error.

Robert Marriot one of the Attorneys of the Court of Exchequer, brought an Ejectione firmæ against Mary Pascall, and upon Not guilty pleaded, the Jury found a speciall Verdict, containing this matter; viz. That King H. 8. the fourth year of his Reigne erected and founded an Hospitall, by the name of the Baster and Chaplains of the Hospitall of King Henry the eighth, de le Savoy: And afterwards in the time of Queen Mary, the said Baster and Chaplains being seised, &c. leased the same to the Defendant by the name of W. Holgill Baster of the Hospitall, Henrici nuper Regis Angliæ septimi vocat le Savoy & Capellani Hospitalis prædict. And afterwards by the former name (which was in truth their very name) leased the same to Thomas Fanshaw, who leased the same to the Plaintiff: And if the Lease aforesaid made unto the Defendant in form and by the name aforesaid, be a good Lease, was all the question. And this matter was argued, and many times debated in the Exchequer, as well at the Bench as at the Bar. And it was argued by Clerk and Gent, Barons there, That the said Lease made to the Defendant was utterly void by reason of the Misnomer. Manwood argued strongly to the contrary; and Judgment was given for the Plaintiff, according to the opinions of the said two Barons: Upon which the Defendant brought a Writ of Error in the Exchequer-chamber before the Lord Chancellor, Treasurer, &c. And now this Term it was argued by Godfrey on the part of the Defendant: Three variances have been supposed in this Lease from the Originall Foundation of the Hospitall in the name of it.

1. The name of the Foundation is the Baster of the Hospitall, &c. Et Capellani dict. Hospicii; So that in the Lease rests part of the name (Capellani) as not immediately annexed to Baster, as it is in the name of the Foundation. But as to that point, the Justices Assisants delivered Godfrey from the arguing of it, as of a variance not materiall: Another variance hath been objected, because that in the Foundation the words are Hospitalis Regis H. 7. and in the Lease the words are, Hospitalis Henrici septimi nuper Regis Angliæ, so as this word (Nuper) is Surplusage, and ex abundant. But of that matter he was also discharged, because it is no variance in substance: But all the difficulty rested in this, that in the Foundation the words are (de le Savoy) and in the Lease (vocat le Savoy) And he put the Case 4 Mar. Dyer 150. The Colledge of Eaton was incorporated by the name of Præpositi & Collegii regalis S. Mariæ de Eaton juxta Windsor, and a Lease is made by the name Præpositi & sociorum Collegii regalis de Eaton, and that was holden a void Lease: And I confess that in the names of Corporations, we ought to resort to the Foundation of the Corporations, for the name of a Corporation is as a name of Baptisme, and ought to be as precisely observed, but that ought to be intended in matter of substance, and not otherwise, vide 10 Eliz. Dyer 278. The Dean and Chapter of Carlisle was incorporated by the name of Decanus & Capital. Ecclesiæ Cathedralis Stat. & individua Trin. Carl. and they make a Lease by the name, Decanus Ecclesiæ Cathedralis S. Trin. in Car. et totum Capit. de Ecclesia prædict. And the same was holden a good Lease, notwithstanding that variance, which is not in substance of the name. And the Dean and Chapter of Peterborow was incorporated by the name of Decanus et Capital. Ecclesiæ Petriburgensis, and they made a Lease by the name Decanus et Capitulum Ecclesiæ de Peterborow, and holden good enough, because the variance was not in any matter of substance: And he cited the Case betwixt Croft and Howell, 20 Eliz. Plow. Com. 337. The Cooks of London were incorporated by the name of Masters, and Governours,

Misnomer of
a Corporation

and Commenalty of the Mytery of Cocks, and they by the Name of Pastor and Wardens of the said Craft and Mytery of Cocks made a Conveyance, and it was holden that the variance assigned in the abundance of this word (Craft) in the Conveyance, which was not in this Corporation, was not any material variance, but only matter of surplusage, for (Craft) and (Mytery) are all one, and of one sense, &c. And so in the principal Case, The Hospital de le Savoy, and the Hospital vocat. le Savoy, sound the same, and in effect do not differ. And as it was said by the Lord Chief Baron in his Argument in the Court of Exchequer, in this case, four things are only to be respected in the Name of a Corporation: first the Name of the living persons who are the Corporation, as in our Case the Pastor and Chaplains: Secondly, the house in which they are resident, and make their abode: Thirdly, The Name of the Founder: Fourthly, the place upon which the place of their abode is built and erected. And if these four matters are sufficiently set down, although not formally, it is good enough. It hath been objected, That the Hospital de le Savoy, and the Hospital vocat le Savoy, do much differ, for de le Savoy, implieth the demonstration of the Place, but vocat le Savoy, trencheth only to the Name, As if the Dean and Chapter de Pauls in London, make a Lease by the Name of Dean and Chapter of Saint Paul vocat. London, so if the Pastor and Fellows of Trinity Colledge in Cambridge make a Lease by the Name of Pastor and Fellows of Trinity Colledge vocat. Cambridge, such Leases are utterly void. I do well agree those Cases, for the Dean and Chapter is not all London, but part of London, and therefore cannot be called or said London, and so Trinity Colledge is but part of Cambridge, and therefore cannot be called Cambridge, but here in our case, The Hospitall is not parcel of the Savoy, but the whole Savoy is the Hospitall, and there is not any part of the Savoy, which is not the Hospitall; But if Trinity Colledge in Cambridge make a Lease by the Name of Pastor and Fellows Collegii vocat. Trinity Colledge in Cambridge, it is a good Lease: And he put a difference, where the word in the Name of the Corporation, which precedes (de) is all one, and of the same Nature with the word which follows (de) and where on the contrary, as in our case, The word which precedes (de) is Hospitall, and the words which follow (de) are le Savoy: are all one and the same thing, so as the Hospitall and Savoy, are all one and the same, and therefore may be well called Le Savoy, and also (de) and (vocat.) in construction are the same, and so our Lease is good enough: and it is found by verdict, That this Hospitall was erected upon the Manor of Savoy, and thereupon it is now commonly called Le Savoy, without any addition of Hospitall, for as it was called Savoy before it was erected into an Hospitall, so it is also called after the Erection, and true it is that the misnaming of a Corporation in any small thing shall abate a writ, for there is only delay, yet it is not of force in a Conveyance, unless the misnaming be in a point material. Coke to the contrary, The variance from the true Name of a Corporation which shall prejudice a Conveyance ought to be in matter of substance, for variance in matter of form and circumstance will not hurt it, sed parum differunt quæ re concordant. And first it is to be confessed, That the Name of a Corporation is as the Name of Baptism, which admits of no variance, and therefore it is said 38. E. 1. 15. by Kniver, when a Man founds a Chantry or a house, &c. it ought to bear such Name as his Founder hath given to it, for that is its proper name. And so it hath been Reported by Bendloes, Serjeant, 4. and 5. Phi. and Mar. That it was holden for a positive Law, by all the Judges of England, That the mistaking of the Name of a Corporation in any matter of substance, makes the Conveyance utterly void, for a name is given to a Corporation upon the foundation, and that by the same Name they shall implead and be impleaded, but that ut idem nomen, et sub eodem nomine sint habiles ad perquirend. & concedend. to be impleaded, and to

implead, but that is to be meant idem re, for it is not necessary, that it be idem littera, for, qui hæret in littera, hæret in Cortice, but if it be idem re with the Foundation it is well enough. And therefore it hath been adjudged; That where the Colledge is incorporated by the Name of Masters and Fellows, Collegii Sc. & individ. Trinit. in Cantabrig. and they make a Lease by the Name of Collegii Trinit. this is good enough, for the word Trinity, implies, and imports Sc. & individ. And therefore such variance was holden not material. But here in our case is a variance in Substance, betwixt the Name given to the Hospital upon the foundation, and the name usurped in the Lease. And the same will clearly appear upon my Argument, viz. If the Name given to this Hospital upon the foundation of it, and the Name usurped in the Lease be not eundem in sensu (not in your private understanding as private persons, but in your judicial knowledge upon the Record quod coram vobis resider, as Judges of Record) then this lease is void, for although you as private persons, otherwise then by Record, know, That the Hospital of Savoy, and the Hospital vocat. le Savoy, are all one Hospital; you ought not upon that your private knowledge to give Judgement, unless also your judicial knowledge agree with it; that is, the knowledge which is out of the Records which you have before you: But if the Name given upon the Foundation, and the usurped Name be not idem sensu in your Judicial knowledge, and you cannot otherwise conceive the Identity of these two Hospitals, nor make any Construction to imagine it but by the Record, for the Record is your eye of Justice, and you have no other eye to look unto the cause depending before you, but the Record, and to this purpose he cited the case of 7 H. 4. 108. Where a man killed another in the presence of a Judge traibailing on the way where the murder was, And at the next Assises in the said County before the same Judge, another man is indicted of the same murder, and arraigned, and convicted by verdict; In that case, The Judge he ought not to carry himself according to his private knowledge, which he hath of the said fact, sci. to acquit the Prisoner, but all that he can do is to respite Judgement against the party, because of the Judges knowing to the contrary, and to make further Relation thereof to the King for his Pardon of grace for the Party. So in our Case, It may be that you in your private knowledge know, That the Hospital de le Savoy, and the Hospital vocat. le Savoy, is all one, but that doth not appear unto you upon the Record which is before you, but it may be for any thing that appears in the Record, that they are diverse and several Hospitals; Therefore the Lease is void. To prove my Point, I do say that this word (de) as here, de Savoy, designes a place, so as by this word (de) the place is become parcel of the Name, but this word vocat. locum non denotat, but onely the very name, and so here is a material difference and variance, for here by presence of the Name in this Lease, there is not any place of the Incorporation in the Name, but the Incorporation is transitory, which cannot be, for a Corporation especial consisting of many persons, as Corpus aggregatum ought to have a certain place of their abiding, or otherwise it cannot be discerned by the Law, and it is but a Mathematical thing, and nothing else but a fiction, and they cannot be otherwise considered in Law, but as they are circumscribed within the bounds of their house, and they cannot appear but by Attorney: and if a Wreband consist upon a Mannor, and afterwards the Mannor by writ be demanded against the Wreband, and he loose it, here he hath lost his Name, because he hath lost that which giveth to him his Name; by the contrary by Blake for his estate and place, in the Chapter, both remain unto him: And secondly, for another Cause here is a material variance, for this word (de) supposeth a place before the Foundation, as the place upon which the Hospital was erected was called Le Savoy before the Erection of it; but these words (vocat. le Savoy) supposeth the same Name Savoy was imposed upon the Foundation; Thirdly, these words (de le Savoy) do import the

Hospitall to be part of the place, which befoze the Foundation, was called Savoy, but vocat. trencheth only to all the place called Savoy: Fourthly; (de le Savoy) is matter of certainty and verity, (vocat.) but matter of Reputacion. And so for these four reasons, great difference in substance appeareth betwixt the very name of the Hospitall, and the same usurped in the Lease. And he cited the Case 29 Eliz. in the Kings Bench betwixt Hall and Wingat. King E. 4. did incorporate the Dean and Cannons of Windsor, by the same of Dean and Cannons of the King and Queens Free Chappel of Saint George the Martyr within his Castle of Windsor; and made a Lease by another name, viz. by the name of Dean and Cannons of the King and Queens Free Chappel there, and the same Lease was made in the time of Queen Mary, and it was holden that the same was a variance in substance. And he cited another Case 30. Eliz. in the Kings Bench betwixt Fisher and Boys. A Colledge in Oxford was by Act of Parliament incorporated by the name of Warden and Scholars, Domus sive Collegii Scholarium de Merton in universitate Oxonia, and they made a Lease by the same Custos Domus sive Collegii de Merton in Oxonia, and Schollares ejusdem domus, and the variance in that point, because in the very name of the Foundation, Domus sive Collegii Scholarium de Merton, and in the usurped name in the Lease Domus sive Collegii de Merton, was holden material, and the true name was de Merton in universitate Oxonia, but in the Lease, in Oxonia only, leaving out the word University, and the same was holden a variance in substance: For Oxford doth contain in it self the University, which is a thing of it self, and also the City is a thing by it self: and it may be that there is a Colledge in the City called Merton Colledge, and also a Colledge which is called by such name in the University: and so in our Case, it may be that there is an Hospitall which is called the Savoy, and also another which is Le Savoy, and then the Court shall be enbegled, &c. And in the end of the Argument, the Lord Treasurer, which was the Lord Burleigh, put this Case, which was adjudged in his time. The Guild of Boston in Lincolnshire, was incorporated by the name of the Guild of St. Nicholas, and our Lady the Virgin Mary, &c. and they made a Lease for years by the name of the Guild of our Lady the Virgin, and Saint Nicholas, Religione quadam motus ut nomen Virginis Mariæ, in charta dimissionis, proponeretur nomini Sancti Nicholai; and it was adjudged a void Lease for the variance aforesaid. And afterwards at another day, the matter was argued by Atkinson, on the part of the Defendant. Scakey 21 E. 4. 56. saith, That the name of the Corporation, by which it is incorporated, is as properly the name of a Corporation, as the name of Baptism is the name of a single and individual person, and yet there is a great difference in the mispision of them, for the name of Baptism doth consist of one word, and therefore it cannot admit of any variance, but the name of a Corporation doth consist of many words: in which case variance in words which are supplied by other words, and not in matter of substance shall not hurt; and that hearing is notably discussed in the case of the Cooks of London, cited befoze by Godfrey. Four things are to be considered in the name of a Corporation, which are of the Essence and Substance of it: First, the persons incorporated, of which the Corporation doth consist, as here the Master and Chaplains de Savoy. Secondly, The quality of the Corporation, as Dean and Chapter, Prior and Commonalty: Thirdly, the Patron or Founder, as, Merton Colledge; Fourthly, The Place whereupon the Corporation is founded; as to this last point, see 31 E. 3. 28. and so. 15. by Knivet, and see 6 Eliz. Dyer. King H 8. erected the Dean and Prebend of Chester, by these words, sci. Decanus et Capit. Cathedralis Ecclesie Christi, et Sanctæ Mariæ Virginis Cestrie. And afterwards by Letters Patents, gave to the said Dean and Chapter, certain Mannors, Decano et Capitulo Ecclesie Cathedralis Christi et Sanctæ Mariæ Virginis, by us befoze erected, and that

that grant was holden void, because that the place where, &c. is not expressed in the said Letters Patents, for Cestria is the local place of the Incorporation. And as to the Objection made upon the word (de) that this word (de) goeth onely to part, and (vocat.) goes to the whole, and so here is a great difference, the same is not any reason, for this word (de) extends as well to the whole as to part. As a Rent granted percipiend. de Manerio de D. the same shall go to the whole Annoz. 3 E. 4. 3. ad respondendum. I. Abbat Monasterii Sanctæ Mariæ Ebor. where the Obligation was, Abbat Monasterii Sanctæ Mariæ Virginis extra mare Ebor. and yet the Writ was well enough, notwithstanding such variance, a fortiori, in the case of a conveyance and Interest. And I conceive that it appeareth in the Record, That the Lease given in evidence of the part of the Defendant, is a Lease made by the Master and Chaplains of the Hospitall of the Savoy, for it is found by verdict, That King Henry the eighth, upon the Solicite of the Spanour of Savoy, betwixt the house of the Bishop of Worcester, and the house of the Bishop of Carlisle, and that it was incorporated by the same, &c. and that afterwards Q. Mary by her Letters Patents, reciting the foundation of the said Hospitall called the Savoy, and lamenting the Ruin of it, being surrendered in the time of E. 6. did restore it, by which it appeareth, That the Hospitall of the Savoy, and Hospitall called the Savoy is one and the same in respect of the Bounds, Foundation, and Situation. And in the whole course of our Bookes, no case can be found, That any Incorporations have avoided their own acts, by such cause of Misnomer, nor of such matter, is any question moved in our Books. And as to that which hath been objected, That although the Judges in their private knowledge well know, That the House de le Savoy, and the House vocat. the Savoy, be all one, yet they ought not to judge according to such their private knowledge, but according to their judicial knowledge, which they have out of the Record. I conceive, That the Judges of necessity ought to use in such cases their private knowledge: as where Misnomer of a Colledge was objected, viz. Trinity Colledge in Cambridge, where it was incorporated by the Name of Masters, Fellows, and Schollars Collegi Sanctæ & individua Trinitat. and they made a Lease by the Name of Master, Fellows, and Schollars of the Colledge of Trinity, the same was holden a good Lease, for the Judges knew well enough, That this word Trinity both imply in it self Sancta & individua, but by what knowledge: not by their judicial knowledge, but by their private knowledge. So in our case, Egerton the Queens Solicitor to the contrary: It is a clear and plain Rule in our Law, That the name of a Corporation is as a name of Baptism to a natural man, and if there be any difference, I conceive, that the Law requires more strict certainty in the name of a Corporation then in the name of any particular person, for a name is more necessary to a Corporation then to another, for when an infant is born, he is presently a perfect creature, before any name given him, and the giving of the name is not a matter of necessity, but of policy for distinction, &c. but in the case of a Corporation, The Name is the substance and essence of it, and it is not a Body before a Name be imposed upon it, and therefore in the Charters of Corporations there is alwaies such a clause, per tale nomen implacitare, & implacitari, acquirere, &c. possint, and without their Name, they are but a Trunch: but contrary in the case of particular persons; land is given primo genito filio J. S. It is a good gift, although there be no Name of Baptism: Lands given omnibus filiis J. S. is a good name of purchase, and if a man be bound in an obligation by a wrong or false Name, and in an action brought upon the same, if it appeareth upon evidence, that he was the same person which sealed and delivered it, the same is sufficient, and the Bond shall binde him. But contrary in the case of a Corporation, and we cannot give any thing to a Corporation by circumstances, induring or imple-

ing their true name. As it is given to the first Hospitall which the Queen shall found, although that it sufficiently appear, That such a one was the Hospitall which the Queen first founded, yet the gift is void: And he deny-
 so, That the four things remembred before are necessarily required in the Name of a Corporation: for if the Queen will found a Corporation, as an Hospitall by the Name of Utopia, the same is well enough without any respect of persons, place, Founder, &c. set forth in the Charter. And also other things besides the said four things are sometimes necessary in a Corporation; As if the Queen will found an Hospitall by the Name, *Quod fundavimus ad rogā. Christ. Hatton Cancel. Angliæ.* all the same ought to be expressed in every grant made by, or to the said Hospitall; So, *Quod fundavimus ad relevandum pauperes;* and sometimes the number of the persons incorporated, if it be in the Charter, it ought to be used in all acts made by or to them; As *Spicer and his Chaplains*, so as the said four things recited before, are not so necessary in the Name of a Corporation, but so far forth as they are parcel of the Name given to them in the Charter of the Corporation: And in our case, 1. The place *de le Savoy*, is part of their name, set down in the charter of their Corporation, and therefore the same ought to be precisely followed; and he relies much upon the argument of Cook in noting material variances, betwixt *de le Savoy*, and *vocat. le Levoy*, as *(de)* signifies part (*vocat.*) the whole (*de*) signifies the place *de facto*: *vocat.* implies reputation only. There is a place near unto Whitehall called Scotland, because that the Kings of Scotland, when they came to our Parliament used there to reside, as the *Lord Treasurer* affirmed, There is also a place in England called Normandy, and another called Callais, and also a place here in Westminster called Jerusalem, but these, Scotland, &c. but by Reputation, so as what difference is betwixt the very Scotland and Scotland here, &c. such and so much difference is there betwixt the Hospitall *de le Savoy*, and the Hospitall *vocat. the Savoy*. And as to that which hath been objected by Atkinson, That this word (*de*) signifies as well the whole as part, as a Rent granted *percipiend. de Manerio de D.* I confess that this word (*de*) hath many significations, so that we ought not onely to consider what (*de*) signifies of it self, but rather to observe what goes before, what follows; for, as saith Hillary, *intelligentia verborum ex causa dicendi sumenda est.* And this word (*de*) is a material word in the Name of a man, therefore also in the name of a Corporation, 26 H. 6. 31. *Assise* by J. de S. and it was found for him, and afterwards the Tenant in the *Assise* brought attain, and in the rehearfall of the *Assise* in the writ of attain he was named I. S. leaving out (*de*) and for that cause the Writ did abate. 18 E. 3. 92. Debt brought by the Executors of John Holbeck, where the Testament was John de Holbeck, and for want of this word (*de*) in the Writ, it was abated by Awar. And in a *Præcipe quod reddat*, against Mich. de Triage, he cast a Protection for Michael Triage, leaving out (*de*) and for such variance the Protection was disallowed, and a *Petit cape award*. And although the Judges in their private knowledge know well enough, That the Hospitall *de le Savoy*, and the Hospitall *vocat. the Savoy*, be all one, yet in point of Judgement they ought not otherwise receive information, but out of the Record, and therefore, if sufficient matter be not within the Record to inform the Judges of the Identity of the said two Hospitalls, their private knowledge shall not avail. And he cited the cause of the *Lord Coniers*, where the Parties being at issue, and the Jury charged for the trial of it. It was found by special verdict, That a fine was leaved of the Lands in Question, &c. but nothing found of the proclamations, whereas in truth, the proclamations were as well given in evidence as the fine, But found, *Quod finis levatus fuit pro, ut per recordum finis ipsius*, in evidenciis ostensum, plenius apparer, Now in that case, although that the Justices knew well enough, That the Proclamations were expressly given in evidence, yet

yet because it did not appear unto them as Judges out of the Record, They would not give Judgement, according to the truth of matter, but according to the Record, so they cannot take notice if the Proclamations be in Chirographers Office or not. But after it appeared unto them, That that defect was but a slip of the Clerk, they commanded the Record to be brought before them, and the proclamation to be inserted in the verdict. And then gave Judgement according to the verdict reformed as aforesaid, and as to the Case of Martin Colledge cited before, he said he was of Council in it, and he knew, That the Judgement there was not given for the cause alleged by Cook, but because that this word, Schollars, was left out in the Lease. And he held, that if in the principal Case, the Lease had been, That the Master and Chaplains of the house called the Hospital of the Savoy, &c. it had been well enough, for there is, de le Savoy, See a good case 36 H. 6. fitz. Brief. 485. by Danby a Corporation cannot be Tenants of Lands, but according to their Corporation, and their foundation, and their very Name, nor they cannot be impleaded, nor take Lands by a wrong Name, nor purchase, nor dispose of their possessions, but by their true Name. And afterwards the matter was compounded by the mediation of friends: and Fanshaw had the Lease for a certain sum of money. See now Cook 10. Reports, The Case of the Mayor and Burgesses of Lyn Regis: See also c. 11. p. Doctor Arays Case, to this purpose.

Mich. 30, & 31 Eliz. in the Common Pleas.

CCXXIX. Huson and Webbes Case.

Robert Huson brought an action of Debt against Anne Webbe, Administratrix of Joan Webbe, and declared of a Contract without specialty. The Defendant pleaded, That she had fully administrated, and it was found against her. And now it was moved for the Defendant, That upon the matter an action of Debt doth not ly against the Executor or Administratrix: which was granted by the Court; But the doubt was, If now, soasmuch as the Defendant by pleading the plea above, hath admitted the action, she shall now take advantage of the Law in that point. For the reason why this action doth not ly against an Executor or Administratrix is, because the Testator himself might have waged his Law, if he had been impleaded upon it, and by indentment of Law the Executor or Administratrix cannot have notice of such a debt, or of the discharge of it; But now by answering to the Declaration as above, the Defendant hath taken notice of the Debt, and in manner confessed it. And by Rhodes and Anderson, Judgement shall be given against the Plaintiff, because it is apparent to the Court, that the action doth not ly. And by Anderson, if Judgement be entred against the Administratrix, in such an action upon Nihil dicit, the Court, ex officio, shall give Judgement against the Plaintiff. Periam and Windham doubted at the first that the Defendant by her plea had admitted the whole matter upon the specialty administrated, pleaded, and had taken notice of the Debt, 41 E. 3. 13. 46 E. 3. 10, 11. 13 E. 4. 25. 13 H. 8. Fitz. Execut. 21. And afterwards Anderson, ex assensu of the other Judges; caused to be entred, Querens capiat nihil pet breve.

Debt lieth not
against Executor
of an Ad-
ministratrix.

Mich.

*Mich. 30. & 31. Eliz. In the Common Pleas. Inrat. Mich. 29.
& 30. Eliz.*

CCXXX. Hambleden and Hambledens Case.

Devise.

The case was, William Hambleden the Father of the Plaintiff, and the Defendant, was seised of the Lands, &c. And by his Will devised to his Eldest Son, Black Acre; to his second Son, White Acre; and to his third Son, Green Acre, in tail. And by his said Will further willed, That in Case any of my said Sons do dy without issue, that then the Survivors be each others heir, The Eldest son dyeth without issue &c. It was moved by Gawdy Serjeant, That the second Son shall have Black Acre in tail, and he cited the Case 30 E. 3. 28. propinquioribus hereditatibus de sanguine puerorum, for the construction of such devises. Walmesley argued, That both the Surviving brothers should have the said Black Acre, for the words of the devise are quilibet supervivens, which amounts to uterque; and the Court was in great doubt of this point. And they conceived, That the estate limited in Remainder to the Survivor &c. is a fee-simple by reason of the words, Each others heir, and also they conceived, That both the Survivors should not have the Land, for the same is contrary to the express words of the devise, The Survivors shall be each others heir, in the singular number, see 7 E. 6. br. Devise 38. A man seised of Land hath issue three Sons, and deviseth part of his Lands to his second Son in tail, and the residue to his third son in tail: and willeth, That none of them shall sell the Land, but that each shall be heir to the other, The second son dyeth without issue, the same Land shall not revert to the eldest Son, but shall remain to the third son, notwithstanding the words each shall be heir to the other.

Mich. 30. & 31. Eliz. In the common Pleas.

CCXXXI. Slywright and Pages Case.

Maintenance.

A Information was in the Common Pleas, by John Slywright against Page, upon the Statute of 32 H. 8. of Maintenance, and declared that the Defendant took a Lease of one Joan Wade, of certain Lands, whereas the said Joan was not seised nor possessed thereof according to the Statute; and upon Not guilty, the Jury found this special matter, That Edmund Wade was seised, and made a feoffment in fee, thereof unto the use of himself and of the said Joan, who he then intended to marry, and the heirs of the said Edmund. The marriage took effect, Edmund enfeoffed a Stranger, who entered, Edmund dyed: Joan not having had possession of the said Land after the death of Edmund her husband, nor being now in possession, by Indenture demised the said Land to the Defendant for years, without any Entry or delivery of the Indenture upon the Land, The said Defendant, knowing the said Joan never had been in possession of the said Land: and also the Defendant being brother of the half blood to the said Joan. The first Question was, If the Lease being made by one out of possession, and not sealed or delivered upon the Land, and so good in Law as to passe any interest, be within the Statute aforesaid. And the whole Court was clear of opinion that it was: for by colour of this pretended Lease, such might be undertaken and advanced to the trouble and disquiet of the possession, for amongst the vulgar people, it is a Lease, and it is a Lease by Reputation: Another matter was moved, because that the entry of the wife is now made lawfull by 32 H. 8. and then she might well dispose of the Land.

But

But as to that, It was said by the whole Court, That the meaning of the Statute was to repress the practices of many, That when they thought they had title or right unto any Land, they for the furtherance of their pretended Right conveyed their interest in some part thereof to great persons, and with their countenance did oppress the possessors: And although here the Lease was made by the said Joan to her Brother of the half blood, yet by the clear opinion of the Court the Lease is within the danger of the Statute, and yet in some Case the Son may maintain his Father, and the Winesman his Winesman. And note in this case it was holden by the Justices, That of necessity it ought to be found by verdict, That the Defendant knowing that the Lessor never had been in possession. And Judgement was given for the Plaintiff.

Mich. 30, 31. Eliz. in the Common Pleas:

CCXXXII. Brokesby against Wickham and the Bishop of Lincoln.

In a Quare Impedit, the Plaintiff counted, That Robert Brokesby was seised of the Advowson, and granted the next Avoidance to the Plaintiff, and Humphrey Brokesby, and that afterwards the Church became void, and after during the avoidance, Humphrey released to the Plaintiff, and so it belongs to him to present. And upon this count the Defendant did demur in Law. For it appeareth upon the Plaintiffs own shewing, that Humphrey ought to have joined with the Plaintiff in the action, for the Release being made after the church became void, is not of any effect, but utterly void. So is the grant of the presentment to the Church where the Church is void, for it is a thing in action. See the Lord Dyer, 28 H. 6. 26. 3 Ma. Dyer 129. 11 Eliz. Dyer 283. Walmesley Serjeant put this Case, Two Joint-tenants of a Rent, the one may release to the other, but if the Rent be behind, now the one cannot Release his Interest in the Arrearages to the other. And afterwards in the Principall case Judgement was given that the Release was void.

*Mich. 30, & 31. Eliz. in the Common Pleas. Intr. Trin. 29.
Eliz. Rott. 721.*

CCXXXIII. Sammes and Paynes Case.

In an Ejectione firmæ the case was, That the Mother being seised of certain Lands, had issue two Daughters, and by Indenture covenanted with diverse persons to stand seised to the use of Eliz. her eldest daughter in tail, upon condition that the said Eliz. should pay to her other daughter within a year after the death of the Mother, or within a year after the said other daughter should come to the age of eighteen years 300 l. And if the said E. should fail in the payment of the sum aforesaid, or should die without issue before such payment, then to the use of the said second daughter in tail. The Mother dyeth, & taketh a Husband, hath issue, and afterwards dyeth without issue before the day of payment. And if the Husband shall be tenant by the curtesie or not, was the Question, And by the Court clearly, he shall be, for as to the condition of payment of the said Sum; The same is not determined; for she dyed without issue before the day of payment, sci. before the second Daughter came of the age of eighteen years; and as to that there is no condition broken; and as to the point of dying without issue, The same is not a condition,

Tenant by the curtesie.

but rather a Limitation of the Estate, and the same is no more then what the Law saith, and the estate tail in Elizabeth, is spent and determined by the dying without issue; and doth not cease, or is cut off by any Limitation; and afterwards Judgement was given for the Tenant by the curtesie. And by Anderson; If a feoffment be made to the use of J S and his heirs, untill J D hath done such a thing, and then unto the use of J D and his heirs, the thing is done, and J S dyeth, his wife shall be endowed.

Mich. 30, & 31. Eliz. In the Common Pleas.

CCXXXIV. Bowry and Popes Case.

Nuisance.

Bowry brought an action upon the Case against Pope, and declared, that in the time of E. 6. The Dean and Chapter of Westminster, leased two houses in Saint Martins in London to Mason for sixty years, The which Mason, leased one of the said Houses to one A and covenanted by the Indenture of Lease with the said A, that it should be lawful for the said A, his executors, and assigns to make a window in the shop of the house so to him assigned, & afterwards in the time of Queen Mary, a window was made accordingly, where no window was there before. And afterwards A. assigned the said house to the Plaintiff. And now Pope having a house adjoining, had erected a new building super solum ipsius Pope ex opposito the said new Window, so as the said Window is thereby stopped. The Defendant pleaded, Not guilty, and it was found for the Plaintiff; and it was moved for the Defendant in arrest of Judgement, that here upon the Declaration appeareth no cause of action, for the window, in the stopping of which the wrong is assigned, appears upon the Plaintiffs own shewing to be of late erected, sci. in the time of Queen Mary, The stopping of which by any act upon my own Land, was holden lawfull and justifiable by the whole Court. But if it were an antient window time out of memory, &c. there the light or benefit of it ought not to be impaired by any Act whatsoever; and such was the opinion of the whole Court. But if the case had been, That the house and soyl upon which Pope had erected the said building, had been under the estate of Mason, who covenanted as abovesaid, Then Pope could not have justified the nuisance, which was granted by the whole Court.

Mich. 30. & 31. Eliz. In the Common Pleas. Intrat. Mich. 29. & 30. Eliz. Rott. 1737.

CCXXXV. Lee and Maddoxes Case.

Covenant.

William Lee brought a writ of Covenant against Richard Maddox, and Isabel his wife, and declared. That one Errington the first husband of the said Isabel was indebted to the Plaintiff in 20 l. and that one George Ashley was also indebted to the said Errington, in the like sum of 20 l. And also that the said Errington made and constituted the said Isabel his Executrix, and dyed, and afterwards the said Isabel by Indenture dum ipsa sola fuit, resitting that whereas her said late husband was indebted to the Plaintiff in the sum aforesaid, and whereas the said George Ashley was also indebted unto her said late husband in the like sum, Now for the better satisfaction of the Plaintiff for his said debt, she appointed and constituted the Plaintiff, attornatum suum irrevocabilem ad petendum, levandum, recuperand. & recipiend. ad usum suum proprium in nomine dict. Isabellæ de dicto Georgio, the said twenty pounds; And the said Isabel covenanted, quod ipsa ad requis. dict. quer. de tempore in tempus, adjuvaret, & manu teneret quamlibet et omnes sectam & sectas

illas quam vel quas dictus quarens commensaret & prosequeretur in nomine dictæ Isabelæ, against the said George, to the use of the Plaintiff, Non existendo Non-suit voluntarie, or making any Discontinuance, Release, Re- vocations, Anglice Countermand, without the assent of the Plaintiff: And declared further, that the Plaintiff had brought a Suit against the said George for the said Debt, and shewed all incertain. And that the said Isabel, depending the said Suite, had taken to Husband the Defendant without the assent of the Plaintiff: And if by this Marriage the said Suit, be Countermanded was the Question. And first it seemed to the Court, that the Declaration was insufficient, because there is not any request furnished in the Declaration, for the words of the Covenant are, Quod ipsa ad requisitionem, &c. So as it seemed to the Justices, that the Plaintiff ought to have notified to Isabel that he had commenced such Suite, otherwise the Action will not lye. And also the Court was of opinion, that here is not any Countermand, for by the taking of the Husband the Suit is not abated, but only abatable; and therefore the Plaintiff ought to have shewed, that by the taking of the Husband, the Suit by Judgment was abated, otherwise it is not any Countermand, and then no cause of Action.

Countermand.

Request.

Mich. 30, & 31 Eliz. in the Common Pleas.

CCXXXVI. Salway and Lusons Case.

Matthew Salway brought a Writ of Right against Luson, and the Writ was, Messuag. & 200. acr. jampnor. & bruerz: And exception was taken to the Writ, because jampnor. & bruerz, are counted together, where they ought to be distinguished severally, As so many acr. jampnor. & so many acr. bruer, although it were objected on the part of the demandant in the maintenance of the Writ, that in the Register the Writ of Right is rediū unius libræ of Cloves & Pence together, without distinction or severance. And it was said, that in a Writ of Right we ought to follow the Register, and therefore a Writ of Right was abated, because this word (Pomarium) was put in the Writ, for in the Register there is no such Writ, because the word Gardinum comprehendit it: But in other Writs, as Writs of Entry, &c. it is otherwise. See the Case of the Lord Zouch, 11 Eliz. 353. In a Writ of Entry sur disseisin mille acr. jampnor. & bruer. But this exception was not allowed, for it may be that jampnor. & bruer. are so promiscuous that they cannot be distinguished: Vide 16 H. 7. 8. 9. The respect the Justices there had to the Register, so as they changed their opinions and confirmed the same to the Register. Another exception was taken to the Writ, because thereby the Demandant doth demand Duas partes Custodiz del Hay in the Forrest of C. And the Court was of opinion that the Writ ought to be Officium Custodiz duarum partium de Hay, &c. and not Duas partes Custodiz. As Advocationem duarum partium Ecclesie, And not Duas partes Ecclesie. Another Exception, because the Writ was, duas partes, &c. in tribus dividend. where it should be Divis. for Dividend. is not in any Writ, but only in a Writ of Partition; And by Windham the parts of this Office are divided in Right, which the Court granted. Another Exception was taken, because that in the Writ it is not set down in what Town the Forrest of C. is, so as the Court doth not know from whence the Writne should come: For no Venire shall be de vicineto Forestæ, as de vicineto Hundredi, & Manerii; And the same was holden to be a material Exception. Another Exception was taken, because a Writ of Right doth not lye of an Office: for at the Common Law an Office did not lye of it, but now it doth by the Statute of West.

Abatement of a Writ.

Vifne.

2. Cap. 25. for it was not Liberum ten. but the party grieved was put to his Quod permittat: And of this opinion was the whole Court.

Mich. 30. & 31. Eliz. In the common Pleas.

CCXXXVII Smith and Lanes ^{vs} Bedell and Moores Case.

Copyholder
determined
by acceptance
of a Lease.

Bargain and
Sale, and con-
sideration of it.

The Queen was seised of a Mannor whereof bl. aer. was holden by Copy in Fee; the Queen leased bl. aer. to B. for one and twenty years, who assigned the same to the Copyholder, who accepted of it. The Queen granted bl. aer. to C. in Fee, the terms expired, C. entered, and his entry was holden to be congeable, for by acceptance of the same Terms, the Customary Estate was determined, as if the Copyholder had accepted it immediately from the Queen: It was also holden by the Court, that a Lease for years under the Seale of the Exchequer may be pleaded, and that without making mention of the Commission, by which the Court of Exchequer is authorized to make such Leases: And so are all the Presidents as well in this Court as in the Court of Exchequer. And whereas the Court was upon the point of giving their Judgment, It was objected by Shuttleworth Serjeant, That here is pleaded a Bargaine and Sale of Land, without saying, Pro quadam pecuniæ summa: And he stood much upon the Exception, and the Court also doubted of it, and demanded of the Pleignothorpes what is their forme of pleading: And by Nelson chief Pleignothorpe, these words Pro quadam pecuniæ summa, ought to be in the pleading. Scot Pleignothorpe contrary. Anderson conceived it was either way good, but Pro quadam pecuniæ summa is the best: And so Lennard Custos Brevium conceived. And the opinion of the Justices was, that a Bargaine and Sale for divers Causis and Considerations is not good without a sum of money. And by Windham, Bargaine and Sale Pro quadam pecuniæ summa, although no money be paid, is good enough, for the payment or not payment is not traversable: And by Periam, If Pro quadam pecuniæ summa be not in the Indenture of Bargaine and Sale, yet the payment thereof is averrable. And for this Exception the Judgment was stayed.

Mich. 30. & 31. Eliz. In the Exchequer Chamber.

CCXXXVIII Bedell and Moores Case.

Action upon
the Case for
not perform-
ing an A-
ward.

Error.

Bedell brought an Action upon the Case against Moore in the Kings-bench, and declared, That the Defendant did assume to performe the Award of J.S. and assumed also, that he would not see Execution upon a Judgment which he had obtained against the Plaintiff in an Action of Account, &c. And shewed further, that the Award was made, &c. (which Award in Law was utterly void) and that the Defendant had not performed the said Award, and also that he had sued Execution against the Plaintiff. The Defendant pleaded Non-assumpsit, and it was found for the Plaintiff, and Judgment given accordingly. Upon which Moore brought a Writ of Error in the Exchequer-chamber, upon the Statute of 17 Eliz. And assigned Error, because the Plaintiff had declared upon two Breaches, whereas for one of them there was not any cause of Action. for the Award is void in Law, and then no breach could be assigned in that: and then when the Jury hath assessed Damages intirement for both breaches, whereas for one there was not any cause of Action by the Law, the Verdict was void, and then the Judgment given upon it reverfable; for it is not reason that the Plaintiff have Damages for such matter for which the Law doth not give an Action. And

And if the Jury had assessed damages severally, viz. for the not performance of the Award so much, and for the suing forth Execution so much, then the Judgement had been good, and the damages assessed for the not performance, &c. void. Manwood Chief Baron: The verdict is well enough for here the whole Assumpsit is put in issue, and there is but one issue upon the whole assumpsit, but if several issues had been joined upon these severall points of the Assumpsit, and both had been found for the Plaintiff and damages, assessed entirely for both breaches, then was the Judgement reversible, for being several issues the Jury might have assessed the damages severally, sci. for each issue several damages, but here is but one issue, and it was the folly of the Defendant that he would not demur in Law upon the Declaration for one part, sci. the not performance of the Award, and traverse the other part, sci. The suing of the Execution, or the Assumpsit of it. And in our case, it may be that the Jury did assess the damages for the suing of the Execution without any regard had to the performance of the Award: And note that the verdict for assessing of the Damages was in these Terms, sci. Et assidunt damna occasione non performance Assumptionis predictæ &c. And Cook who was of Counsel in this Case, put this Case. The late Earl of Lincoln, Admiral of England, brought his action of Scandalis Magnatum, and declared, That the Defendant exhibited in the Star-chamber against him a Bill of Complaint, containing diverse great and infamous slanders: viz. That the said Earl was a great and outrageous oppressor, and used outrageous oppression, and violence against the Defendant, and all the Country also. The Defendant pleaded, Not guilty, and found for the Plaintiff, and assessed damages, and it was moved in stay of Judgement, first, That the Plaintiff had declared upon matter of slander for part, for which an action lyeth, and for part not. For for the oppression supposed to be made to him self, no action lyeth because every subject may complain for wrong done unto him, and although he cannot prove the wrong, an action will not ly. But as for the oppression done to others by the supposal of the Bill an action lyeth, for what is that to him, he hath not to do with it, for he is not pars gravata. But because the Jury assessed Damages entirement, the Judgement was arrested, for the cause aforesaid. And afterwards in the principal case, the last day of this term, Judgement was stated.

Hill. 31 Eliz. in the Kings Bench.

CCXXXIX. Palmer and Thorps Case.

BETWIXT Palmer and Thorpe, the Case was this, A man demise his Honour of M for thirty two years, and the day after let the same Honour for forty years, to begin from Michaelmas, after the date of the first Lease, and the Tenant attorned. And by Cook the same is a good grant although to begin at a day to come, for it is but a Chattel; and so was the opinion of Wray Chief Justice, for a Lease for years may expect its commencement, as a man seised of a Kent in Fee grants the same for twenty years from Michaelmas following, and good, for no estate passeth presently; but only an Interest. See 28 H. 8. 26. Dyer.

Hill. 31. Eliz. In the Kings Bench. Rot. 668.

CCXL. Sir Anthony Shirley and Albanyes Case,

Assumpsit.

In an action upon the Case, upon Assumpsit by Sir Anthony Shirley against Albany. The Plaintiff declared, That he was seised of the Manor of Whittington for the term of his life, the Reversion to the Earl of Arundell in fee, and so seised, surrendered all his Estate to the said Earl, who afterwards by his Deed granted a Rent-charge of 40 l. per ann. out of the said Manor to him, and afterwards conveyed the Manor to the Defendant in fee. And afterwards, 27 Maii 22. Eliz. upon a Communication betwixt the Plaintiff and the Defendant concerning the said Rent: the Defendant did promise to the Plaintiff, that if the Plaintiff would shew unto the Defendant any Deed, by which it might appear that he ought to pay to the Plaintiff such a Rent, he would pay that which is due, and that which should be due from time to time. And further declared, that 27 April, 27 Eliz. he shewed unto the Defendant a Deed, by which it appeared that such a Rent was granted, and due. And so: eighty pounds due for the two last years, he brought the Action; The Defendant pleaded, that after the said promise, and before the shewing of the said Deed, sc. 14. Jan. 22. Eliz. the Plaintiff entered into the said Land, and leased the same for three years: The Plaintiff Replicando said, that 1. Decem. 27 Eliz. the Defendant did re-enter, upon which they were at Issue, and it was found for the Plaintiff. It was moved by Glanvil Serjeant, that by the entry the Promise was suspended, and being a personall thing once suspended, it is alwaies extinct. Wray, the Action is brought for the Arrearages due the two last years, and so at the time of his re-entry the Plaintiff had not cause of Action, and therefore it could not be suspended. Gawdy, When the Plaintiff sheweth the Deed, the Defendant is chargable to arrearages due before and after the promise: wherefore if the entry maketh a suspending of the Rent, the suspension doth continue: but I conceiue here is not any suspension, for this promise is a meer collateral thing, and so not discharged by the entry unto the Land, for it is not issuing out of the Land: But if the Plaintiff before the Deed shewed had released all Actions, the same had been a good Bar, and I conceiue that the Deed was not shewed in time, for it ought to be shewn before any arrearages due after the promise, but here it is shewn five years after: But that was not denied by all the other Iustices. Another exception was taken, that where the promise was, that if the Plaintiff shewed any Deed by which it might appear, that the Defendant should be charged with the said Rent, and the Declaration is, by which it might appear, that the Plaintiff ought to have the Rent, &c. so as the Declaration doth not agree in the whole. See 1 Ma. 143. in Browning and Beksens Case, the Condition of the Lease was, if the Rent should be arrearaged, not paid by two Months after the Feast, &c. and the Rejoinder was by the space of two months, &c. And the pleading holden insufficient, for per duos menses doth not affirm directly post duos menses, but by Implication and Argument: And here it was holden, that the Condition was a good consideration. Another exception was taken, because the promise is layed. All the Rent ad tunc debitum aut deinceps debend. It was holden, that this word (ad tunc) doth refer to the time of the shewing of the Deed, and not to the promise. And as to the last exception but one, it was resolved, that the Declaration, notwithstanding the same, was good enough (sc.) ostendit factum per quod apparet quod redditus predict. solvi deberet in forma predict. Another exception was taken, because here no breach of the promise is al-

Suspension of
Rent.

ledged,

ledged, for it is pleaded, that eight pounds de annuali redditu arer. fuer. but it is not said, de redditu prædict. 8 l. ergo it may be another Kent, and then the promise, as to this Kent, is not broken. Wray, Although the word (prædict.) be wanting, yet the Declaration is well enough, and it shall be intended the Kent mentioned before. See 21 H. 7. 30. b. Where (Villa West.) shall be intended Villa prædict. 19 E. 4. 1. In a Quare Impedit the Plaintiff doth entitle himself by grant of the next Avoidance cum acciderit, and doth not shew in his Count that the same was the next Avoidance, and yet the Count was holden to be good, for so it shall be intended: so here: And he says, It is not necessary that a Declaration be exactly certain in every point, but if one part of it expound the other, it is well enough: And although the Identity of the Kent doth not appear by the word prædict. yet it appeareth by other circumstances, as by the daves of payment, &c. and no other Kent can be intended. And now, this Exception is after Verdict, and therefore saveably to be taken: And afterwards Judgment was given for the Plaintiff.

Hill. 31. Eliz. In the Kings Bench.

CCXLI. Musted and Hoppers Case.

In an Action upon the Case, the Plaintiff declared, That where he and one Ackinsal, were jointly and severally bounden by Obligation in fifty pounds, to a stranger, for the only debt of the said Ackinsal, which Ackinsal dyed, and the Defendant married afterwards his Wife, and so the Goods of Ackinsal came to his hands; yet the Plaintiff, the first day of May after, which was the day of payment of the money, paid five and twenty pounds for avoinding the Forfeiture of the penalty. The Defendant as well in consideration of the Premises, as in consideration that he might peaceably enjoy the Goods of the Testator promised to pay the said sum, cum inde requisitus fuer. And upon Non assumpit, the Jury found the payment of the said sum, and all the precedent matter: And that the Defendant in consideration præmissorum, promised to pay the said sum if he might peaceably enjoy the Goods of the said Testator. It was moved in arrest of Judgment, that although here the Jury have found sufficient cause of Action, yet if the Declaration be not accordingly, the Plaintiff shall not have Judgment. And here the Plaintiff hath declared upon two Considerations, and the Jury hath found but one, sci. if he peaceably enjoy the Goods of the Testator. Also the Plaintiff declared of a simple promise, and the Jury have found a Conditionall, Si gaudere potest, &c. And so the promise set forth in the Declaration, is not found in the Verdict.

Assumpit.

Verdict.

Gawdy was of opinion, That the first consideration is good, for the Plaintiff entred into Bond at the request of the Defendant, and then the promise following is good: But the second consideration is void, sci. That the Defendant shall enjoy the goods of the Testator, &c. as if it had been that he should enjoy his own goods, and all the Justices were clear of opinion, That the promise found by the Jury is not the promise alledged in the Declaration, and so the issue is not found for the Plaintiff, and so the judgment was Rayed.

Consideration

Trinit. 30. Eliz. In the Kings Bench, *Rot.* 568.

CCXLII. Creckmere and Patterfons Case.

Devise conditionall.

UPon a special Verdict, the Case was this, Robert Dookin was seised of certain Lands in Fee, and, having issue two Daughters, devised the same to Alice his Eldest Daughter, that she should pay fourty pound to Anne her sister at such a Day: the money is not paid, whereupon Anne entred in to the moiety of the Land: And it was holden by the whole Court, that the same is a good Condition, and that the Entry of Anne was lawfull. It hath been adjudged, That where a man devised his Land to his wife, *Proviso*, *My will is*, That she shall keep my house in good Reparations, that the same is a good Condition. Wray, A man deviseth his Lands to B. paying 40 l. to C, it is a good condition; for C hath no other remedy, and a Will ought to be expounded according to the intent of the Devisor.

Hill. 31. Eliz. in the Kings Bench:

CCXLIII. Dove and Willliots and others Case.

In an Ejectione firmæ, upon a special Verdict, the case was, That W was seised of the Land, where, &c. and held the same by Copy, &c. and surrendered the same unto the use of E. for life, the Remainder to Robert and A. in Fee, Robert made a Lease to the Defendant; E, Robert, and A. surrendered the said Land, *Sci.* a third part to the use of Robert for the life of E. the Remainder to the Right heirs of Robert, and of another third part to the use of Robert for life, the Remainder to E, the Remainder to Richard, &c. and of another third part to the use of A and his Heirs. After which Partition was made betwixt them, and the Land where, &c. was allotted to Richard, who afterwards surrendered to the use of the Plaintiff. It was holden, That Judgement upon this verdict ought not to be given for the Plaintiff, For the Lessee of Robert had the first possession, and that Lease is to begin after the death of E, who was Tenant for life, and when E and he in the Reversion join in a Surrender, thereby the estate for life in that third part is extinct in Robert, who hath the Inheritance, and then his Lease took effect for a third Part. So that the Parties here are Tenants in Common, betwixt whom Trespasse doth not ly.

Hil. 31. Eliz. in the Kings Bench.

CCXLIV. Bulleyn and Graunts Case.

Copyhold.

Devise.

UPon Evidence to a Jury, the Case was, That Henry Bulleyn the Father, was seised of the Land being Copyhold, and had Issue three Sons, Gregory, Henry, and Thomas, and afterwards surrendered to the use of the last Will, and thereby devised the said Land to Joan his Wife for life, the remainder to the said Henry, and the Heirs of his body begotten: Joan dyed, after admittance, Henry dyed without Issue, and afterwards the Lord granted it to Thomas and his Heirs, who surrendered to the use of the Defendant then his Wife for life, and afterwards dyed without Issue: Gregory eldest Son of Henry Bulleyn entred, &c. Coke, When the Father surrendereth to the use of his last Will, thereby all passeth out of him, so as nothing accrue
 eth

est to the Heir, nor can he have and demand any thing before admittance: Wray. The entry of Gregory is lawfull, and admittance for him is not necessary, for if a Copyholder surrendereth to the use of one for life who is admitted, and dyeth, he in the Reversion may enter without a new Admittance. It was moved by Coke, if this Estate limited to Henry be an Estate-tail, or a Fee conditionall. For if it be a Fee-Simple conditionall, then there cannot be another Estate over: but yet in case of a Devise an Estate may depend upon a Fee-Simple precedent, but not as a Will, but as an Executory Devise. Wray, It is not a conditionall Estate in Fee, but an Estate-tail. Coke, They who would prove the Custome to entail Copyhold Land within a Pannor, it is not sufficient to shew Copies of Grants to persons and the Heires of their bodies, but they ought to shew that surrenders made by such persons have been avoided by reason of such matter. Wray, That is not so, for Customary Lands may be granted in tail, and yet no surrenders have been made within time of memory.

Copyhold Estate.

Mich. 31 Eliz. In the Kings Bench

Matthew and Hassalls Case.

In an Ejectione firmæ, betwixt Matthew and Hassall, the Plaintiff had Judgment to recover, and the Defendant brought a Writ of Error, and assigned Error in this, that the Judgment was entered, Quod querens recuperet possessionem, &c. where it should be (Terminum) vent. in ten. prædict. See 9 Eliz. Dyer 258. Coke contrary, That the Judgment is good enough, for the Writ of Execution upon it is Habere facias possessionem, and in a reall Action the Writ is, Quod petens recuperet sefinam, and hoc terram. And afterwards Judgment was affirmed.

Error.

Hil. 21 E. 2. in the Kings Bench.

CCXLVI. *Tempest and Mallets Case.*

In an Action of Trespass by Tempest against Mallet, Judgment was given, and Error brought: and assigned for Error, that whereas the Action was brought against four, one of them dyed, Mesne betwixt the Award of the Nisi prius, and the Inquest taken: And it was said on the part of the Defendant in the Writ of Error which was entered upon the Record, that the Plaintiff shewed unto the Court the death of one of the Defendants, and prayed Judgment against the others. See 4 H. 7. 2 Eliz. 155. And there is a difference, where in an Action of Trespass there is but one Defendant, and where many. Another Error was assigned, the Defendant Obtulit se per Higgins Attornat. suum, without shewing his Christian Name, as John, or William, for Higgins onely without the Christian Name, is not any Name, for it is but an addition to shew, which John, or William. Coke, The same is helped by the Statute of 42 H. 8. cap. 30. Where it is enacted, that after Verdict, Judgment shall be given notwithstanding the lack of Warrant of Attorney of the part against whom the Issue shall be tried, or any default or negligence of any the parties, their Counsellors or Attorneys: and of necessity this default here in the Christian Name ought to be the fault of one of them. See also 18 Eliz. Cap. 14. for want of any Warrant of Attorney, &c. Glanvil. The Statute provides for default of Warrant of Attorney, &c. Then (Coke) To what end was the Statute of 18 Eliz. made? for the Statute of 31 H. 8. provides for defects of Warrants of Attorney. Glanvil, The first Statute provides for Warrants of Attorneys of such persons against whom

whom

whom the Issue was tryed, but the later Statute is generall. Another Error was assigned, Quod defendens Capiatur, where the Difference, & so the Fine is pardoned by Parliament; and therefore the entry of the Judgment ought to be, Et de fine nihil, quia perdonatur. Coke, The Judgment is well enough, for in every generall Pardon some persons are excepted, & it doth not appear if the Defendant here were one of them; and then the Fine is not pardoned, for the Court cannot take notice of that, as it was holden in Serjeant Harris Case: but if the Defendant be charged with the Fine, then he ought to plead the pardon, and to shew that he was not any of the persons excepted. And afterwards at another day the Defendant did alledge, that there was a Warrant of Attorneys in the Common Pleas. And also it appeareth upon Record, that the Defendant did appeare upon the Superfedeas by Attorneys, who had his full Name, and therefore payed a Certiorare de novo, to certify the same matter, vide 9 E. 4. 32. Wray, A Case here greatly debated betwixt the Lord Norris and Braybrook, and upon a Deviser such a Writ of Error was granted after the Plaintiff had pleaded In nullo est erratum; for this Plea, in nullo est erratum, goes but to that which is contained within the body of the Record, and not unto collaterall matter, scil. Warrant of Attorneys: And afterwards the Writ of Error was allowed, and upon the day of return thereof, it appeared upon the Record of Superfedeas, that the Defendant did appeare by such a one his Attorneys: But it was said by the Court, that there ought to be two appearances, the one upon the Superfedeas, and the other when the Plaintiff declares, See as to the name of the Attorneys, Tithells Case, 1 Mar. Dyer 93.

Hi. 31 Eliz. in the Kings Bench.

CCXLVII. Palmer and Knowllis Case.

Palmer recovered Debt against Knowllis, and sued Execution by Elegit, upon which the Sheriff returned, that he had made partition of the lands of the Defendant by the oath of twelve men, but he could not deliver it to the party, for it is extended to another upon a Statute, upon which the Plaintiff sued a Capias ad satisfaciendum. And now came the Defendant by his Counsell, and moved that after Elegit returned, the Plaintiff could not resort to the Execution by Capias, and therefore payed a Superfedeas, because the Capias erronee emanavit. But the whole Court was clear to the contrary; for upon Nihil returned upon Elegit, the Plaintiff shall have a Capias, 17 E. 4. 5. See 21 H. 7. 19. A man shall have a Capias after a Fieri facias, 12 Elegit, 34 H. 6. 20. and here the speciall return doth amount to as much, as if the Sheriff had returned Nihil: also the Statute of West. 2. which giveth the Elegit, is not in the Negative, and therefore it shall not take away the Execution which was at the Common Law. And here is no Execution returned, for after the former extent ended, he ought to have a new Elegit; which Wray granted: and afterwards the said Knowllis was taken by force of the Capias ad satisfaciendum, and came into Court in the Custody of the Sheriff, and the Case was opened, and in the whole appeared to be worthy of labour, but by the Law he could not be helped, and although he instantly payed a Superfedeas, yet the same was denied unto him.

Hi.

Hill. 31. Eliz. In the Common Pleas.

CCXLVIII. The Church-wardens of Fetherstones Case.

An Action of Trespals was brought by the Churchwardens of Fetherstone in the County of Norfolk, and declared That the Defendant took out of the said Church a Bell, and declared, That the Trespals was done 20 Eliz. And it was found for the Plaintiffs. And now it was moved by Godfrey in arrest of Judgement, That it is apparent upon the Declaration, That the Trespals was done in the time of their Predecessors, of which the Successors cannot have action: and actio personalis moritur cum persona. See 19 H. 6. 66. But the old Churchwardens shall have the action. Cook contrary, and that the present Churchwardens shall have the action, and that in respect of their office, which the Court granted. And by Gawdy Churchwardens are a Corporation by the Common Law. See 12 H. 7. 28. by Frowick That the new Churchwardens shall not have an action upon such a Trespals done to their Predecessors, contrary by Yaxley. See by Newton and Palkin, That the Executors of the Guardian in whose time the Trespals was done shall have Trespals.

Church-wardens.

Passch 31. Eliz. In the Kings Bench.

CCXLIX. Hauxwood and Husbands Case.

In an action upon the Case, the Plaintiff declared for disturbing of him to use his common, &c. and shewed, That A. was seised of certain lands, to which this Common was appendant, for the term of his Life, the Remainder to B in tail, and that the said A and B did demise unto him the said Lands, for years, &c. Pepper, The Declaration is not good, for it is not shewed how these particular estates did commence. See 20 E. 4. 16. By Pigot, secondly, Lessee for life cannot prescribe, and he, and he in the Remainder, cannot prescribe together; and he in the Remainder cannot have common: Also he declares, That Tenant for life, and he in the Remainder demised to him, whereas in truth it is the demise of Tenant for life, and the Confirmation of him in the Remainder; also he doth not aver the life of Tenant for life. Popham, He needs not to shew the commencement of the particular estates, for we are a stranger to them, the Prescription in them both is well enough, for all is but one estate, and the Lease of both. See 27 H. 8. 13. The Lessee for life, and he in the Reversion made a lease for life, and joyned in an action of waste, and there needs no averment of the life of the Tenant for life, for he in the Reversion hath joyned, which Gawdy granted as to all. And said, The particular estates are but as conveance unto the action. Wray conceived the first Exception to be material, &c.

Prescription.

Trin 31. Eliz. In the Kings Bench.

CCL. Sweeper and Randals Case, Rot. 770

In an action of Trespals for breaking of his Close, and carrying away of his goods, by Sweeper against Randall, upon Not guilty pleaded. The Jury found, That one John Gilbert was seised of the Land, where, &c. and leased the same to the Plaintiff at Will, who sowed the Land, and afterwards the Plaintiff agreed with the said Gilbert, to surrender to him the said

Surrender.

Land, and his interest in the same; and the said Gilbert entered, and leased to the Defendant, who took the Coyn. It was moved, If these words, I agree to surrender my Lands, be a present and expresse surrender. Gawdy, It is not any surrender, for Tenant at will cannot surrender, but it is but a relinquishing of the estate, if it be any thing, but in truth it is not any thing in present; but an act to be done in future. Wray, I agree. A demise of the Danno of D at will, it is no Lease, no more shall it be here any Surrender, or any relinquishing of the estate. Clench conceives. That the intent of the Parties was, to leave his estate at the time of the speaking, otherwise those words were void, for he might leave it at any time without those words. Gawdy, If such was his intent, the Jury ought to finde it expresse; and afterwards Judgement was given for the Plaintiff.

Trin. 31. Eliz. in the Kings Bench.

CCL. Ward and Blunts Case.

Trover and
Conversion.

In an Action upon the Case of Trover of certain Loads of Coyn at Henden in Middlesex, and the conversion of them; The Defendant pleaded, That before the conversion, he was seised of certain Lands called Harminglow in the County of Stafford, and that the Coyn whereof, &c. was there growing, and that he did sever it, by force of which he was possessed, and the same casually lost; and that the same came to the hands of the Plaintiff, and the Plaintiff casually lost the same, and the same came to the hands of the Defendant at Henden, aforesaid, and he did convert the same to his own use, as it was lawfull for him to do: upon which the Plaintiff did demur in Law. Atkinson, The Plea is good, for the conversion is the point of the action, and the effect of it. For if a man take the same, and do not convert, he is not guilty. And here the Defendant doth justify the conversion, wherefore, he cannot plead, Not guilty. The generall issue is to be taken where a man hath not any colour, but here the Defendant hath colour, because the coyn whereof, &c. was growing upon his Land; which might enbeigle the lay people, and therefore it is safest, to plead the special matter. But admit, that it doth amount but to the generall issue; yet there is not any cause of Demurrer, but the Plaintiff ought to shew the same to the Court and pray, that the generall issue be entered; and the Court ex officio ought, to do it. Egerton, the Queens Solicitor, contrary. The Plea in Bar is not good, The Plaintiff declares of a Trover of his goods, ut de bonis suis propriis, and the Defendant pleads, That he took his own goods, which is not any answer to the Plaintiff. See 22 E 3. 18. In trespass of taking and carrying away of his Trees, The Defendant pleads, That they were our Trees, growing in our own soil, and we cut them and carried them away, and the plea was challenged, wherefore the Defendant pleaded over, without that that he took the Trees of the Plaintiff. So 26 Ass. 22. and 30 E 3. 22. Another matter was, The Plea in Bar is, That before the time of the Conversion, The Defendant was seised of the Land, and sowed it; and that after the Coyn was severed, (but he doth not say that he was seised at the time of the severance) and then it might be that he had severed the coyn of the Plaintiff, &c. and that was holden by the Court to be a material exception, wherefore Judgement was given for the Plaintiff: But as to the first Exception, the same was disallowed, for the Court ex Officio, in such case ought to cause the general issue to be entered, but the Plaintiff ought not to demur upon it.

Trin. 31. Eliz. In the Kings Bench.

CCLIV. Cheiny and Langleys Case, *Hill. 31. Eliz. Rott. 638.*

The case was, That Tenant for life of certain Lands leased the same for years by Indenture, with these words, I give, grant, bargain, and sell my interest in such Lands for twenty years, To have and to hold, in such manner, and so far as I my self did hold the same, and no otherwise, Tenant for life dyed within the Term; and he in the Reversion entred, and the Lessee brought an action of Covenant. Godfrey, The action doth not ly, for here is not any warranty, for the Plaintiff is not Lessee, but Assignee, to whom this Warranty in Law cannot extend; but admit that the warranty doth extend to the Plaintiff, yet it is now determined with the estate of the Tenant for life, and so the Covenant ended with the estate. See 32 H. 6. 32. by Littleton 9. Eliz. Dyer 257. And if Tenant in tail make a Lease for years (as supra) and afterwards dieth without issue, the covenant is gone; and after Judgement was given against the Plaintiff.

Lessee.

Covenant.

Trin. 31. Eliz. in the Kings Bench.

CCLV. Fish, Brownes, and Sadlers Case, *Intrat. Mich. 29. Eliz. Rot. 606.*

An action upon the Case was brought by Fish and Brown against Sadler, Hill. 29. Eliz. rot. 606. and they declared, That they were proprietaries of certain goods, which were in the possession of one A against which A Sadler one of the Defendants had commenced a feigned and covinous suit in the Ecclesiastical Court in the Name of one Collison, to the intent to get the said goods into his possession, of which the Plaintiffs having notice, and to the intent that the said Plaintiffs should suffer the Defendant to recover and obtain the said goods by the said suit, the Defendant did promise to the Plaintiffs to render to them a true account of the said goods; and shewed further, That by the said suit the Defendant did obtain the said goods by sufferance of the Plaintiff. Tanfield, It is a good consideration, the Plaintiffs were not parties or privies at the beginning of the suit, and it is not like Onlies case in 19. Eliz. Dyer 355. Where in an action upon the Case Onlie declared, That the Defendant Countesse, &c. being a widow, had divers suits and businesses, and that the Plaintiff at her request had bestowed great labour and travail, and had expended circa the affairs of the said Countess 1500 l. Whereupon she promised to the Plaintiff to pay all the said expenses, and such a sum above for that matter, which is the ground of the action, is maintenance, and malum prohibitum, but such matter is not here; for it is lawful for a man to use means to get his goods. Gawdy, All covins are abhorred in Law, and here the Plaintiffs are privies to the wrong, and therefore, it cannot be any consideration. Wray, Although that the suit at the beginning was wrongfull and covinous, yet when the Plaintiffs who were owners of the said goods do assent to such proceedings now the suit is become just and lawful ab initio, and so no wrong in the consideration, but all the wrong is purged by the agreement. If any covin be, the same is between Sadler and him who is sued, to whom the Plaintiffs are not privies. Clench, If this privy betwixt the Plaintiffs and Sadler had been before the said suit, so the consideration is without any fraud. Cooper Serjeant conceived here is not any good consideration, upon which the Promise of the Defendant

Assumpsit and consideration.

Covin.

Defendant may be grounded, for the Defendant hath not any benefit by it, and he cited the case between Smith and Smith 25 Eliz. Egerton, Where the consideration is good enough, for the plaintiffs forbear their own suit which was a hinderance unto them. Clench was of opinion, that the Plaintiff should not have Judgement, for that suit was begun by Sadler in the Name of Collison without his privity, and therefore it was unlawfull, and the same was for the goods of another man, which is unlawfull also, and then when the unlawfull act is begun, the illegall agreement afterwards that they shall proceed is unlawful also, and therefore there cannot be any consideration: and as to the covin, it is not material, for without that, the matter is illegal enough. Also the Declaration is not good in this, because it is not shewed in what Court the suit did depend, so as it might appear unto us, that they had power to hold plea of it; Gawdy agreed with Clench in the first point, and also in the last, and by him, in the assumpsit, the Plaintiff declares, that a suit was depending betwixt the Defendant and another, and where the Plaintiffs if they were produced might have given strong witness against the Defendant, the said Defendant in consideration that the Plaintiffs would not give Testimony against him, promised to give to the Plaintiff 20 l. the same consideration will not maintain this action; because it is unlawful for any man to suppress testimony in any cause. Wray, Here is a consideration good enough, for where Sadler should loose costs upon the first suit, now upon this promise upon his account he shall be allowed the same, the which is a benefit unto him: and as to the shewing in what Court the suit doth depend, that needs not by way of Declaration, but the same shall be shewed by way of Evidence, and it is not traversable, and it is but inducement to the action. And as to the covin, that is not here, for covin is alwaies to the prejudice of a third person, but so it is not here: But in truth this suit was unlawfull, for Sadler so to sue in the Name of another, and therefore it cannot be a good consideration. And for that cause, it was awarded, Quod querens nihil capiat per billam.

Trin. 31. Eliz. in the Kings Bench.

CCLIV. *Howe and Connyes Case.*

Trespas.

In an action of Trespas by Howe against Conney, the case was, That Lone Smith was seised of two houses, and leased one of them to his brother for life, and afterwards by his Will devised, viz. I give to my Executors, All my Lands and Tenements free and copy, to hold to them, and they to take the profits of them for ten years, and afterwards to sell the said Lands and Tenements; and afterwards dyed, his brother dyed before the quarter of a year after: and it was found, That the Executors entred into the house undemised, and took the profits, but not into the other, and that at the end of the said ten years, they sold the whole. Godfrey, The house only which was in possession, shall passe by the will. (To hold unto them) doth imply matter of possession, so as nothing passeth but that whereof they may take the profits, the which cannot be of a bare Reversion, also by this devise, the Executors have not interest in the thing devised but for ten years. whereas the brother of the Testator had an estate for life, which by possibility might continue above twenty years, and to prove that the meaning of the devise to be collected upon the words of the Will ought to direct the construction of the Will, he cited Chicks case, 19 Eliz. 357. and 23 Eliz. 371. Dyer. At another day it was argued by Cook, That both the Houses passe, and the words (take the profit) do not restrain the general words before, (viz. All my Lands and Tenements) but rather expounds them, sci. such profits that they might take

Devise.

take of a Reversion, cum acciderit, for it may be that the brother shall dye within the ten years. And he cited the case 34 H. 6. A man seised of diverse Reversions upon estates for life, devise them by the name of omnium terrarum & tenementorum, which were in his own hands, and by those perols, the Reversion did pass, and yet the Reversion (to speak properly) was not in his hands: and if the brother had dyed in the life of the devisor, they had clearly passed, and then his death or life shall not alter the case. And he resembled the case to the case in 39 E. 3. 21. The King grants to the Abbot of Redding, That in time of vacation the Prior and Monks shall have the disposition of all the possessions of the said Abbey ad sustentationem Prioris & Monachorum, and if in the time of vacation they shall have the Abbotsions, was the question, for it was said, That abbotsions could not be to their sustentation, but yet by the better opinion the grant of the King did extend to Abbotsions, for it shall be intended such sustentation as Abbotsions might give. Godfrey, Our Case is not like to the case of 34 H. 6. for there the Devisor had not any thing in possession, therefore if the Reversion did not passe, the devise should be utterly void. Gawdy conceived that the house in possession only passed, for the devise extends to such things only, whereof the Profits might be taken, but here is not any profit of a Reversion. Clench, and Wray contrary, The intent of the devise was to perform the Will of his father, and also of his own Will, and in case, the house in possession was not sufficient to perform both the Wills all shall passe, and therefore the devise by favorable construction is to be taken largely, so as the wills might be thoroughly performed, and also the devise is general, and further all his Lands and tenements, which are not restrained by the subsequent words (to take the profits) for to have and to hold, and to have and to take the profits is all one.

Trin. 31 Elix. In the Kings Bench.

CCLV. Slugge, and the Bishop of Landaffs case.

Slugge libelled against the Bishop of Landaff in the Ecclesiastical Court, because where he was presented by the Dean and Chapter of Gloucester to the Church of Penner, the Bishop did refuse to admit him, and now the Bishop sued a Prohibition, and Moved, Quod non habetur talis Rectoria cum cura animarum in eadem diocesi, sed perpetua vicaria. And by Popham a Prohibition doth not lye, but the matter ought to be determined in the Ecclesiastical Court, and when he who is presented to the same Church, whether it be a Church or not, shall be tried in an action of trespass, and the like matter was ruled, Mich. 14. Eliz. betwixt Weston and Grendon, who was presented by the Queen, and it was holden, that because institution and admission do belong to the Ecclesiastical Court, and not to the Kings Court, that no Prohibition should lye, and therefore he prayed a consultation. And note, That the Defendant in the Prohibition did not demur formally upon the suggestion for the Judges use, if the suggestion be not sufficient to maintain the Prohibition, to grant a consultation without any formal demurrer upon the suggestion, if the insufficiency of the suggestion be manifest, which was granted by the whole Court. Cook, That a Consultation ought not to be granted, for whether there be such a Rectory or not shall be tried here. So 2 H. 4. 30. Prior or not Prior, 49 E. 3. 17, 18. Wife, or not Wife, but never accoupled in loyal matrimony by the Bishop, 44 E. 3. So within or without the Parish, 50 E. 3. 20. So, 45 E. 3. Quare Impedit, 138. In a Quare Impedit, no such Church within the County. Afterwards, at another day, Popham put the case, Slugge was presented to the vicaridge of Penner, the Bishop refused to admit him, and admitted one Morgan Blethen unto the Parsonage

Prohibition;

Trial.

of Penner, at the presentment of the Lord St. John; Slugge sued the Bishop for contumacy, per duplicem querelam, The Bishop said, Non habetur talis vicaria, upon which matter he sued a Prohibition, and he conceived, That the Prohibition did not ly, for a Vicar is but he, that gerit vicem Personæ, to supply his place in his absence, so as the same is a spiritual matter which ought not to be tryed here, also the libel is, to have admission and justification, and the other matter ariseth by their Plea, sci. Quod Rectoria de Penner est Ecclesia cum cura animarum, absque hoc quod habetur talis Vicaria, and so it is but an incident to the principal matter, wherefore it shall be tryed there, and he prayed a Consultation. Cook, We have shewed, That in the time of E. 3. one L. was seised of the Mannor of Penner, to which the Church of Penner is appendant; and we alledge presentments from that time, and we convey it to the Lord St. John, which now is, and they would now defeat us by this surmise, That there is no such Church with cure of Souls, which is tryable here. Popham the libel doth contain nothing but contumacy in the Bishop, in that he hath not admitted Slugge, and the other matter comes in the Replication, and afterwards by assent of the parties a Consultation was granted, quoad inquisitionem of Slugge only, but that they should not proceed further.

Pasch. 31. Eliz. Rot. 154 In the Kings Bench.

CCLVI. Fennick and Mitfords Case.

The Case was, A man seised of Lands in Fee, levieth a Fine to the use of his wife for life, the remainder to the use of his eldest son, and the heirs males of his body, the Remainder to the use of the right heirs of the Conusor, The Conusor makes Lease for a thousand years to B. the eldest Son dyeth without issue male, having issue a daughter, the Conusor dyeth, the wife afterwards dyeth, the eldest son enters and leaseeth the Lands to the Plaintiff. Atkinson, That upon this conveyance a Reversion, was left in the Conusor, although by the fine all is conveyed out of the Conusor; and so (as it hath been objected) the use limited to the right heirs of the Conusor, is a new thing: for it is to be observed, When a man is seised of Lands, he hath two things, the Land, or the Estate, and secondly the use which is the profits, and if he make a Feoffment without consideration, by that the estate and possession passeth, but not the use, wherefore the use descends after to the Son and Heir. And in our case if the wife and Son had died without issue in the life of the Father, all should be in the Father and his heirs. And if a man make a Feoffment in Fee, unto the use of his last Will, it shall be unto the use of the Feoffor, and his heirs, and in our case, this limitation to the Right Heirs of the Conusor is, as if no mention had been made of it, and then it should be to the Father, and his heirs. And afterwards it was adjudged, That it was a Reversion, and no Remainder, and by Gawdy, This Limitation, To his Right Heirs, is merely void, Wray, As if he had made a Feoffment to the use of one for life, without further Limitation.

Hill. 31. Eliz. Rot. 723. in the Kings Bench:

CCLVII. Holland and Franklins Case.

In a Replevin, the Defendant made Conusans as Bayliff to Thomas Lord Howard, and shewed, That the Writ of the Prioresse of Holliwell was seized of the Pannour of Prior in her demesne as of Fee, &c. and 4 Nov. 19. H. 8. by Deed enrolled sold unto the Lord Audley, the said Pannour, who dyed, having issue a Daughter, who took to Husband, Thomas late Duke of Norfolk, who had issue the said Lord Howard, and that after their death the said Pannour descended, &c. The Plaintiff in bar of the conusans shewed, That the said Deed was primo deliberatum, 4 Nov. 30 H. 8. And that mean betwixt the date and the delivery, sci. 12. October, The said Prioresse leased the said Pannour to one A. for ninety nine years, and conveyed the Term to the Plaintiff, absque hoc, that the Prioresse bargained and sold the said Pannour to the Lord Audley, ante dimissionem predict. dicto A. fact. upon which there was a Demurrer. Cook, This Averment of another delivery then the Deed doth purport against the Deed enrolled, shall not be received, no more then a Man may aver, That a Recognizance was acknowledged at another day, &c. for every Record imports a truth in it, and expresse averment shall not be received against it, but a man may confess and avoid, Dec. 7 H. 7. 4. It cannot be assigned for error, that in a R. dissellin, the Sheriff non accessit ad tenementa, as he hath returned for that is against his Return which is Recorded, and the date of the Record is the principal part of it, which see 37 H. 6. 21. by all the Justices, That matter of Record hath alwaies relation to the date, and not to the Delivery, contrary of a Deed which is not of Record, for the same shall have relation alwaies to the delivery, and see 19 H. 6. 32. by all the Justices averment against a deed enrolled that it was not delivered shall not be received, so in the Case betwixt Ludford and Gretton, 19 Eliz. Plow. 149. It is holden by all the Justices, That the Kings Charter hath relation to the time of the date, because that matters of Record carry in them by presumption of Law for the Highness of them, truth, and therefore one cannot say, That such a Charter was made or delivered at another day, then at that at which it bears date, So of a Recognizance, Statute, &c. but against Letters Patents a man may say, Non concessit, for perhaps nothing passeth thereby, and then it is not contrary to the Record. Atkinson contrary, I confess that the party himself (whose deed it was) cannot take a direct averment against a deed enrolled, but he may confess and avoid it, so as he leave it a Record, as if a Fine be levied by another in my name of my Land, I am bound by it, but if the Fine were levied by another in my name I am not bound, for I may confess and avoid it; and yet leave the Record good, but here the Plaintiff is a stranger to his deed enrolled: And some Records shall bind all persons, as certificates of Baskardys, &c. for all may give the evidence in such case, 2 H. 5. Estoppel 91. A makes a Feoffment in fee and afterwards before the Coroner confesseth a felony supposed to be done before the Feoffment, the Feoffee shall have an averment against it. Egerton the Queens Solicitor, contrary, Matter of Record cannot be gainsaid in the point, as in matter of implication, and therefore against that he cannot say, Non est factum, 16 E. 3. Abb. 13. A deed enrolled in pais, cannot be denied, 24 E. 3. 64. A Deed enrolled is not a Record, but a thing recorded, which cannot be denied. And here this plea is a violent averment against the deed for it amounts to as much as if he had said, Not his deed at the time of the Enrollment: But I confess that such a deed may be avoided, by a thing which stands with the deed by matter, out of the deed. It hath been objected, That

Replevin.

Averment

Relation of Records and Deeds.

Averment.

That this acknowledging of the deed ought to be made by Attorney, and therefore made in person it is not any acknowledgement, and so against such acknowledgement, Non est factum may be pleaded, and a fine or confession in a writ of annuity upon prescription, or in assise shall binde the house, See 16 E. 3. Abb. 13. That a fine, Recognizance, and Covenant of Record shall binde the House in such case. And the acknowledgement of the Prioresse alone will serbe in this Case, for the Priores are as dead persons, And posito, that a Master of the Chancery comes into the chapter-house, and receives such an acknowledgement, I conceive that it is good enough: It hath been objected, That here the Plaintiff is not estopped to take the averment, because we have not pleaded our matter by way of Estoppel: certainly the same needs not here, for the Record it self carries the Estoppel with it, and the truth appeareth by the Record, and the Court ought to take hold of it. Godfrey contrary, A deed enrolled may be avoided by matter, which is not contrary to the Record, as 19 R. 2. Estoppel 281. in sur cui in vita, a Release of the Mother of the Demandant with warranty was pleaded in bar, and that enrolled, To which the Demandant said, That at the time of the Release supposed to be made, our mother had a husband, one F, and so the Deed was void, and so avoided the deed by matter Dehors, sci. Coverture, so of infancy, but not by a generall averment: A man not lettered shall avoid a deed enrolled by such special matter, so, an obligation made against the Statute of 23 H. 6. and these special matters shall utterly avoid the deeds against whom they are pleaded, but in our case we do confess the deed to be good to some intent, sci. after our Lease expired, for which our case is the better case. And at another day it was objected, That the deed could not be acknowledged without a Letter of Attorney, being a Corporation, which consisted upon divers persons as Priores and convent, and they are alwaies to be intended to be in their chapter-house, and cannot come into Court to acknowledge a Deed: To which it was answered by Cook, That this acknowledgement being generally pleaded, it shall be intended, that it was done by a Lawfull means, and there is no doubt, but that such a Corporation may leby a fine, and make a Letter of Attorney to acknowledge it, and see, 2 Ma. Fulmerstons case 105. It was further objected, That this Deed was enrolled the same day that it beareth date, for the pleading is per factum suum gerens Datum, 2 Novemb. 29 Hen. 8. et iisdem die & anno irrotulat. And by the Statute such a deed ought to be enrolled within six months next after the date, so as the day of the date is excluded, and so it is not enrolled within the six months: as to that it was answered by Cook, That the time of computation doth begin presently after the delivery of the deed, as in the common Cases of Leases, If a man makes a Lease for years to begin from the day of the date, the same is exclusive, but if it be to have and to hold from the date of the deed, it shall begin presently. And an Ejectment supposed the same day is good, and then here, this Enrolment is within the six moneths, and yet see 5 Eliz. 128. Dyer Pophams case. It was also objected, That it is alledged in the consuls, That the Harneur was sold to the Lord Audley, and that the Deed of Bargain and Sale was acknowledged and enrolled in the Chancery, the said Lord being then Lord Chancellor, and he cannot take an acknowledgement of a Deed, or enrolment of it to himself, for he is the Sole Judge in the said Court, so as the deed is acknowledged before himself, and enrolled before himself, and that is good enough, for here we are not upon the common Law, but upon the Statute, and here the words of the Statute are performed. And the enrolment of the Deed is not the substance of the Deed, but the deed it self. Also the acknowledgement of the Deed, after it is enrolled is not material for he is estopped to say that it is not acknowledged. And as to the matter it self, a man shall not have averment against the

the purport of a Record, but against the operation of a Record, as not put in issue, not compassed, partes ad finem nihil habuerunt, &c. And against Letters Patents of the King, Non concessit, is a good plea, which see 18. Eliz. for by such plea it is agreed, that it is a Record, but that nihil operatur.

Mich. 31. Eliz. in the Kings Bench. Rot. 258.

CCLVIII. Osborn and Kirtons Case.

In Debt upon an Obligation, The Defendant cast a Protection, upon which the Plaintiff did demur. Tanfield, The Protection is not good, for the Defendant is let to Bail, and so is intended alwaies in prison, for so the Record makes mention, and then the Protection quia moratur in portibus, &c. is against the Record, and the Court ought to give credit to Records especially. Secondly the words of the Protection are, That Kirton is employed in Obsequio nostro, which is no cause of protection, for the usual form (and so is the Law) that such a person be employed in negotio Regni, for the defence of England, &c. For if the King will give aid unto another Kings Subjects employed in such service, he shall not have Protection. And afterwards variance was objected betwixt the Bill and Declaration, and the Protection: for the Bill is against John Kirton of A Gentleman, and the Protection is John Kirton onely. But the same was holden no such variance being onely in the Addition, for before the Statute 1 H. 5. additions were not necessary in any actions.

Debt.

Protection.

Hil. 30. Eliz. Rot. 156. in the Kings Bench.

CCLIX. Bopton and Andrews Case.

In Debt upon an Obligation, the Condition was, to make sufficient assurance of certain Lands to the Obligee before the tenth day of March 17 Eliz. And if it fortune the said Obligee be unwilling to receive, or dislike such assurance, but shall make Request to have one hundred pounds for satisfaction thereof. Then if upon such Request, the Obligor pay one hundred pounds within five moneths, That then the Obligation shall be void. And at the day, the Obligee doth refuse the assurance, and afterwards 27 Eliz. request is made to have the hundred pounds, It was the clear opinion of the whole Court. That the said Request was well enough for the time, and he might make it at any time during his life, and he is not restrained to make it before the day in which the Assurance is to be made, and afterwards judgment was given for the Plaintiff.

Debt.

Mich. 29. & 30. Eliz. Rot. 546. In the Kings Bench.

CCLX. Knight and Savages Case.

In a Writ of Error was brought upon a Judgement given in Leicester in Debt, Tanfield assigned error, because in that Suit there was not any plaint, and in all inferior Courts, the plaint is as the original at the common Law, and without that no proceſſe can issue forth. And hereupon the Record nothing is entered but that the Defendant somonitus fuit, &c. and therefore the first entry ought to be A. B. queritur adversus, C. &c.

Error.

Clench, A Plaint ought to be entred befoze pprocess issuet, and the summons which is entred here, is not any plaint, and for that cause the Judgement was reversed: It was said. That after the Defendant appeared, a Plaint was entred, but it was said by the Court, That that shall not mend the matter, for there ought to be a plaint out of which the pprocess shall issue, as in the Courts above out of the original Writs.

Trin. 31 Eliz. In the Kings Bench.

CCLXI. Kirby and Eccles Case.

In an action upon the Case the Plaintiff declared, Quod cum quidam communicatio fuisset betwixt the Plaintiff, and one Cowper, That Cowper, should mast certain Hogs for the Plaintiff, the Defendant did promise, That in consideration, that the Plaintiff should give unto the Defendant three Shillings and four pence, for the fattening of every Hog, That the said Hogs should be redelivered to him well fattened; to which promise and warranty, the Plaintiff giving faith, delivered to the said Cowper one hundred and fifty Hogs to be masted; and that one hundred of them were delivered back, but the residue were not: It was moved, That here is not any consideration for which the Defendant should be charged with any promise: but it was argued, on the other side, That the Promise was the cause of the Contract, and being made at the time of the Communication and contract, should charge the Defendant, but if the promise were at another time, it should be otherwise. There was a Case lately betwixt Smith and Edmunds, Two Merchants, being reciprocally indebted the one to the other, agreed betwixt themselves to deliver all their Bills and Bonds into the hands of one Smith, who promised that he would not deliver them to the parties until all accounts were ended betwixt them; and yet he did deliver them, and for that an action brought against him was adjudged maintainable: yet there was not any consideration, nor was it material, for the action is grounded upon the Deceit, and so is it here, upon the Warranty: and of that opinion were Clench and Wray, Justices, but Gawdy was of a contrary opinion.

Hill. 30 Eliz. Rot. 679. In the Kings Bench.

CCLXII. Woodshaw and Fulmerstones Case.

Woodshaw, Executor of Heywood, brought Debt upon a Bond against Richard Fulmerstone, and the Writ was dated October Mich. 29. & 30. Eliz. and the Condition of the Bond was, That if Fulmerstone dyed before his age of one and twenty years, and before that he had made a Journey to A his Wife, daughter of the Testator Heywood, Then if the said Defendant causes one hundred pounds to be payed to the said Heywood, within three moneths after the death of the said William, that then the Bond should be void, and the said William Fulmerstone dyed 30. Septem. 30. Eliz. which matter he is ready, &c. The Plaintiff doth traverse, absque hoc, that the said Heywood dyed intestate. Tanfield, It appeareth of Record that the Plaintiff hath not cause of action, for this one hundred pounds, was to be paid within three Moneths after the death of William Fulmerstone, as the Defendant hath alleged, which is also confessed by the Plaintiff, and this action is entred Mich. October 30. Eliz. sci. within a moneth after the death of William Fulmerstone, and so before the Plaintiff hath cause of action, and therefore he shall be barred. Gawdy, Where it appeareth to the Court, that the Plaintiff

Plaintiff hath not cause of action, he shall never have Judgement, as in the
Case between Tilly and Worddy, 7 E. 4. but here it doth appear that the Plain-
tiff hath cause of action, for where a man is bound in an obligation, the same
is a duty presently, and the condition is but in defeazance of it, which the Obligation.
Defendant may plead in his discharge.

Trinit. 31. Eliz. In the Kings Bench.

CCLXIII. Windham and Sir Edward Cleers Case.

Roger Windham brought an action upon the Case against Sir Edward, de-
clared that the said Ed. being a Justice of Peace in the County of N. and
where the Plaintiff was a lovall subseq, and of good fame all his life time, not
root touched, or reproched with any offence of Robbery &c. the Defendant, ma-
liciose & invidie machinans ipsum Rogerum, de bonis nomine, fama et vita depri-
vare, directed his warrant to divers Bayliffs & Constables of the said County to
arrest the said Plaintiff: and it was alledged in the said warrant, That the
Plaintiff was accused before him of the stealing of the horse of. A. B. by rea-
son of which the Plaintiff was arrested, and so detained untill he had entred
into a Bond for his appearance, &c. whereas in truth, he was never accused
thereof, nor ever stole such horse, and whereas the Defendant himselfe knew
that the Plaintiff was guiltlesse, by reason of which, he was greivously discredit-
ed, &c. And it was found for the plaintiff: And it was ordered, that upon
this matter an action doth not ly, for a Justice of Peace if he suspect any per-
son of felony, or other such offence may direct his warrant to arrest him.
14 H. 8. 16 Gaudy and Clench, If a man be accused to a Justice of Peace
for felony, for which he directs his warrant to arrest him, although the
accusation be false, the Justice of Peace is excused, but if the partie in truth
was not accused before the Justice, it is otherwise: It was a Case latelie be-
twixt the Lord Lumley and Foord, where Foord in a letter written by him,
had written, It is reported, That my Lord Lumley seeketh my life: If it was
not Reported, an action upon the Case lyeth, but if reported, no Action lyeth:
so here, if he was accused no Action lyeth, but if not, an Action lyeth:
And afterwards in the principall Case, Judgement was given for the plain-
tiff.

Trinit. 31. Eliz. in the Kings Bench.

CCLXIV. Isleys Case.

Isley and others were plaintiffs in an Ejectione firmæ, and upon the gene-
rall Issue it was found for the plaintiffs, and 4. dayes after the verdict
given, was moved in Way of judgment a speciall matter in Law, whereof the
Justices were not resolved for the law, but took advilement and gave day over;
and in the meane time one of the plaintiffs dyed, which matter the defendant
demanded to the Court in further Way of the Judgment: But by Coke, the
same is not any cause, for the Posse came in Quindena Pasc. which was 16.
Aprill, at which day the Court ought to have given Judgment presently,
but, tooke time to be advised, and the 19. of Aprill, one of the plaintiffs dyed,
And the favour of the Court ought not to prejudice us; for the judgment here
shall have Relation to the 16. of Aprill. at which time he was alive; and it
was so of late adjudged in the Case of Derick James, who dyed the day after the
verdict, and yet Judgment was not stayed, for the Court after verdict
cannot examine surmises, and they have not day in Court to plead, and in

our case, It was but a day of Grace, and no entry is made of it; Although no plea can be now pleaded after verdict, yet as amicus curie, one may inform us of such matter. And sometimes in such case, Judgement hath been stayed, as 9 Eliz. and sometimes notwithstanding such Exception as 2 Eliz. So as I conceive the matter is much in the discretion of the Justices, And because the same was a hard verdict, and much against the Evidence, It is good discretion upon this matter to stay Judgement, and such was the opinion of the Court.

Trin 31. Eliz. in the Kings Bench.

CCL XV. Steed and Courneys case.

Error.

Prescription to
levy a fine, not
good.

Error was brought upon a fine levied upon a Plaintiff in a writ of Coterminant in the City of Exeter. And two Errors were assigned: First, The plaintiff was, quod teneat convent. de duobus tenementis. Whereas in truth, the said Tenement doth not comprehend any certainty, for in the Writ (Tenement) is understood, Messuages, Land, Meadows, pasture, &c. and whatsoever lyeth in tenants: And 11 H. 6. 18. by grant of Lands and Tenements, Rent of Common shall passe. And an Ejectione firmæ doth not ly of a Tenement, nor a forcible entry supposed in a Tenement, 11 H. 7. 35. and 38 H. 6. 1. Another error was, because the fine was levied in the Court of the City of Exeter. Which see 44 E. 3. 37. 38. those of Exeter can prescribe to have the Consuls: but the same ought to be by special Charter of the King by expresse words: Egerton the Queens Solicitor, who came under the Justices, and was not of Counsel in the case said, That he was of Counsell in a case betwixt Bundery and Bird, where such a fine levied in Chetier by prescription was in question, was by a Writ of error reversed: and afterwards in the principal case the fine was reversed for the first Error.

CCL XVI. Trin. 31 Eliz. In the Kings Bench.

Devises.

The Case was this, Grandfather, Father, and Son: The Grandfather seised of a house called the Swan in Ipswich, devised the same to his eldest Son for life, the Remainder to a Son of his eldest Son, and the heirs males of his body, the Remainder to the right heirs of the Devisor, and to the heirs males of his body, and dyed. The Father and Son dyed without issue male, the Son having issue a Daughter, who entred and assured the Land unto one Hawes, and covenanted, That she was seised of the said Messuage of a certain and sure estate in Fee-simple. Godfrey, That the Daughter shall take the last Remainder, as right heir at the time that it ought to be executed. and to the heirs males of her body, as if it had been devised to her by her proper Name, so she hath but an estate tail, and so the covenant is broken. Cook contrary: At the time that the devise took effect by the death of the Devisor, the Father was his Right heir, so as the Remainder rested in him immediately, and shall not expect in adavance untill the Father and Son by without heir male of the Son, for the Father is a person able to take, so that upon the death of the Devisor, the Father is to stand for life, the Remainder to the Son, and the heirs males of his body, the Remainder to the Father in tail or supra, the Reversion to the Father in fee, and the daughter hath the same Reversion by descent after the Entayles spend; all which Wray Justice granted.

Mich. 31 & 32. Eliz. In the Common Pleas, *Intra: Trin. 31 Eliz.*
Rot. 1529.

CCLXVII. Galliard and Archers Case.

Galliard brought an action upon the Case against Archer. The Plaintiff declared, That he himself was possessed of certain goods, which by Trover came to the hands of the Defendant, who hath converted them to his own use: The Defendant pleaded, That before the Trover supposed, one A was possessed of the said goods as of his proper goods, and sold them to the Defendant, and that he had not any notice, That the said goods were the goods of the Plaintiff; upon which the Plaintiff did demur in Law. And by Anderson the plea is not good, for the Plaintiff may chuse to have his Action against the first finder, or against any other, which gets the goods after by Sale, Gift, or Trover; And by some, The Defendant having the goods by Sale, might traverse the finding: See Contr. 27 H. 6. 13. a. And see by some, In detinue where the Plaintiff declares of a Bailment, The Defendant may say, That he found them, and traverse the Bailment, 39 H. 6. 37. by Moile, and by Windham Justice; The Defendant may traverse the property of the goods in the Plaintiff, 12 E. 4. 11.

Trover and
Conversion.

Mich. 31 & 32 Eliz. In the Common Pleas.

CCLXVIII. Edwards and Tedburies case.

Edwards of London was indebted unto one A of the same City, and Edwards delivered goods to one Tedbury Carrier of Excester, who went to him to carry for him certain wares, to be carried to Excester, to certain Tradesmen there, the said goods to be delivered to them, &c. And so the said goods, wares, and merchandizes, being in the possession of the Defendant Tedbury to be carried to Excester, the said A caused them to be attached in the hands of the said Carrier, for the Debt of the said Edwards, The said Carrier being then privileged in the Common Pleas, by reason of an action there depending. And by the clear opinion of the whole Court, the said Attachment ought to be dissolved: For the Carrier for the reason aforesaid is privileged in his person, and his goods, and not only in his own goods, whereof the property belongs to him, but also in such goods in his possession for which he is answerable to others, &c. And so it was adjudged.

Bailment of
goods to a
Carrier.

Attachment of
goods.

Mich. 31 & 32 Eliz. In the Common Pleas.

CCLXIX Cockshall, and the Mayor, &c. of Boaltons Case.

Henry Cockshall brought an action upon the case against the Mayor, Town-Clark, and Commoners of Boalton, in the county of L. and declared, That where he himself had affirmed a plaint of Debt in the Court of the said Town, before the said Mayor, &c. against I. S. and thereupon had caused the said J. S. to be arrested, The said Defendants did conspire together to delay the Plaintiff of his said suit, in perill of his debt, had let the said I. S. go at large without taking bail: Periam Justice conceived, That upon that matter, that the action doth not lye, for the not taking of bail is a judicial act, for which he shall not be impeached, but all the other Justices were of strong opinion against him, for the not taking of Bail is not the cause of the action, but the conspiracy.

Conspiracy.

Mich. 31. and 32 Eliz. in the Common Pleas

CCLXX. Erbery and Lattons Case.

In a Replevin, The Defendant doth avow, because he is seised of such a Mannor, within which there is a Custome That the greater parte of the Tennants at any Court within the said Mannor holden appearing may make By-lawes, for the most profit and best government of the Tennants of the said Mannor &c. and that such By-lawes should binde all the Tennants &c. and shewed further, That at such a Court holden within the said Mannor the Homage there, being the greater part of the Tennants of the Mannor aforesaid, at the Court aforesaid appearing, made this By-lawe, scilicet, That no Tennant of the said Mannor should put into such a Common any Steere being a year old or more, upon payne of six pence for every such Offence, and that it should be lawfull to distreyn for the same: And the Court was Cleere of opinion, That the By-law was utterlie void, for it is against Common Right, where a man hath Common for all his Cattell Commonable, to restrayne him to one kind of Cattell, &c. But if the By-lawe had bin, That none should put in his Cattell before such a day, the same had bin good, for such By-lawe doth not take away, but order the Inheritance: For the nature of a By-law is to put Order betwixt the Tennants concerning their assayres within the Mannor, which by law they are not compellable to doe: And by Periam, The Avowant ought to have averred, That this By-law was for the Common profit of the Tennants: See the Lord Cromwells Case. 15. Eliz. Dyer. 322. and afterwards in the Principall Case, Judgment was given against the Avowant.

Mich. 31. and 32. Eliz. in the Common Pleas.

CCL XXI. Wickes and Dennis Case.

Replevin.

Wickes brought a Replevin of Dennis, who avowed, That one Dennis his father was seised of the Mannor &c. and granted of it to the avowant a Rent of twenty pounds per annum, and further granted, That if the said Rent be arreare unpaid six dayes after the feasts, &c. wherein it ought to be paid, si licite petatur, That then it should be lawfull to distreyn: The grantour afterward by Indenture Covenanted with the Lord Treasurer and others, to stand seised of the same Mannor, unto the use of himselfe and his heires, until he or his heires have made default in the payment of one hundred pounds per annum, untill three thousand pounds be paid, and after default of payment, to the use of the Queen and her heires, until the summe of three thousand pounds should be paid and leyed: The grantor afterwards leyed a fine to the said Lord Treasurer and others to the uses aforesaid, the Rent is arreare; default of the payment of the hundred pounds is made, Office is found, The Queen seised the land, the Avowant during the possession of the Queen demanded the Rent, and the arreareages thereof, The Queen granted over the manor to Wick and Bosden, and Dennis the grantee did distrayne for the rent, and arreareages demanded, ut supra, It was moved by Harris, Serjeant That this demand of severall summs payeable at severall dayes before, is not good; for every summe ought to be severallie demanded when it was first due, scil. si licite petatur, scil. within the six dayes: for otherwisse without such demand, distresse is not lawfull, and hee resembled it to the case of Sir Thomas Gresham 23. Elizabeth Dyer, 372 of severall Tenders. Periam

conceived that the demand ought to be severall, Anderson, That the demand is good enough, And as to the demand made during the possession of the Queen. It was holden by the whole Court to be good enough; for although the possession of the Queen be privileged, as to the distress, yet the demand is good, without any wrong to her prerogative; for the Rent in right is due, and the possession of the Queen is in right charged with it, and the Rent is only recoverable by Petition, and was by way of distress, and if the partie sueth to the Queen by Petition for the said Rent; he ought to shew in his Petition, That he hath demanded the Rent, for if the possession had bin in a Common person, he could not distress before demand, nor by consequence have Issue: And the Rent, notwithstanding the possession of the Queen, is demandable and payable for to entitle the partie unto Petition against the Queen, and to distress against the subject when the possession of the Queen is removed. And see 7 H. 6. 40. disseisee may make continuall clayme, although the possession of the Land of which he is disseised be in the King, And 34. H. Br. seisin 48 If the heire at full Age intrude upon the possession of the King, and payes Rent to the Lord of his Land holden of a subject, the same is a good seisin, and shall bind the heire after he hath sued his liberty 5 E. 4. 4. and see 13 H. 7. 15. That distress taken upon the possession of the King is not lawfull, but seisin obtained during it, is good. so in 21. H. 7. 2.

Demand of a
Rent-charge
during the
possession of
the King,
good.

Mich. 31. and 32 Eliz. in the Com. Pleas. int. M. 30. and 31. Rot. 458.

CCLXXII. Ashgells and Dennis Case

Ashgell brought a Quare impedit against Dennis, and the plaintiff Counted that the defendant had disturbed him to present ad vicariam de D. and shewed that the Queen was seised of the Rectory of D. and of the Advowson of the vicarage of D. and by her letters Patents gave unto the plaintiff Rectorem predictam cum pertinentiis, et etiam vicariam Ecclesie predictae. And it was holden by the whole Court, That the advowson of the vicarage by these words doth not passe, nor so in the Case of a Common person much lesse in the Case of the King: But if the Queen had granted Ecclesiam suam of D, then, by Walmesley Justice, the advowson of the vicarage had passed.

Quare impedit.

Mich. 31. and. 32. Eliz. in the Common Pleas.

CCLXXIII. Collman and Sir Hugh Portmans Case

In Ejectione firmæ by Collman against Sir Hugh Portman it was found by speciall verdict. That the lands where were holden by Coppie of the Banno of D. whereof Sir. H. Portman, was seised, and that the plaintiff was Copeholder in fee, and further found, That the said Sir Hugh, pretending the said Cope hold lands to be seised, entred into one Communication with Collman touching the same, upon which Communication it was agreed betwixt them, That the said Collman should pay to the said Sir Hugh five pounds, which was paid accordingly, and that, in consideration thereof, Collman should enjoy the said Customary lands, except one Wood called Combwood; for his life and also of Alice his wife, durante sua viduitate, and that Collman should have Election whether the said lands should be assured unto him and his said wife by Cope, or by Will, &c. and hee chose by Will, which was made accordingly and further found, That the said Sir H. held and enjoyed in his possession the said Wood, &c. and upon this matter, The Court was in clear opinion That here is a good surrender of the said lands, and that for life only, and that the said Sir Hugh had the Wood discharged of the customary interest.

Ejectione firmæ.

Surrender of a
Copy-holder

Mich.

Mich. 31 & 32 Eliz. In the Common Pleas.

CCLXXIV. Thetford and Thetfords Case.

Debt.

In an action of Debt for Rent, the Plaintiff declared, That Land was given to him, and to T. his wife, and to the heirs of their bodies, and that his wife leased the Lands to the Defendant, and that the Dones were dead, and that the Plaintiff as heir, &c. for rent arrears, &c. and upon Non demiserunt, the Jury found that the Husband and Wife demiserunt, by Indenture, and afterwards the husband dyed, and the wife entered, and within the term dyed: Now upon the matter it seemed clear to Anderson, that the Jury have found for the Defendant, *sci.* Non demiserunt, for it is now no lease ab initio, because the Plaintiff hath not declared upon a Deed. 1 Ma. Dyer 91. and also the wife by her disagreement to it, and the occupation of the Land, after the death of her Husband, hath made it the Heirs of the Husband only.

Mich. 31 & 32 Eliz. In the Common Pleas.

CCLXXV. Rockwood and Rockwoods Case.

Assumpsit.

In an action upon the case, the case was this. The Father of the Plaintiff Land Defendant being sick, and in danger of death, and intending to make his will, In the presence of both his sons the Plaintiff and Defendant, declared his meaning to be, To devise to the Plaintiff his younger Son a Rent of 4 l. per annum, for the term of his life out of his Lands, and the Defendant being the eldest Son (the Intention of his Father being to charge the Land with the said Rent) offered to his Father and Brother, That if the Father would forbear to charge the Land with the said Rent to his Brother during the life of his Brother, according to the intention of his said Father, Whereupon the Father asked the Plaintiff if he would accept of the offer and promise of his brother: who answered, he would; whereupon the Father relying upon the promise of his said eldest Son, forbear to devise the said Rent, &c. so as the Land descended to the Eldest Son discharged of the Rent: and the opinion of the whole Court in this case was clear, that upon the whole matter the action did well lye.

Mich. 31 & 32 Eliz. In the Common Pleas.

CCLXXVI. Petty and Trivilians Case.

Livery of
 seisin.

Humphrey Petty brought Second Deliberance against William Trevilian, And upon special verdict the case was, That A was seised of certain Land, and Leased the same for years, and afterwards made a Deed of feoffment unto B, and a Letter of Attorney to the Lessee, C and D conjunctim vel divisim in omnia & singula terras et Tenementa intrare et seisinam inde, &c. secundum formam Chartæ, &c. Lessee for yeares by himself makes Libery, and seisin in one part of the Land, and C in another part, and D by himself in another part, It was first agreed by the Justices, that by that Libery by Lessee for yeares his Interest and Term is not determined, for whatsoever he doth, he doth it as an Officer, or Servant to the Lessor. Secondly, It was agreed, That these several Liberties were good and warranted by the Letter

of Attorney, especially by reason of these words, In omnia & singula, &c. so as all of them, and every of them might enter and make Liberty in any and every part. And so it was adjudged.

Mich. 31. & 32 Eliz. in the Common Pleas.

CCLXXVII. Rigden and Palmers Case.

Rigden brought a Replevin against Palmer, who avowed for damage fea-
 Rans in his Freehold, the Plaintiff said, That long time befoze that
 Palmer had any thing, he him self was seised, untill by A B and C disseised,
 against whom he brought an Assise and recovered, and the estate of the
 Plaintiff was mean between the Assise, and the recovery in it, The De-
 fendant said, That long time befoze the Plaintiff had any thing, One Gris-
 fish was seised, and did enfeof him, abque hoc, that the said A B and C vel
 eorum aliquis aliquid habuere in the Lands, at the time of the Recovery,
 Walmesley Justice was of opinion, That the Bar unto the Abowry, was not
 good, for that the Plaintiff hath not alledged, That A B and C were Ter-
 tenants tempore recuperationis, and that ought to be shewed in every reco-
 very, where it is pleaded. And then when the Defendant traverseth that
 which is not alledged it is not good: Windham contrary: For the Assise
 might be brought against others as wel as the Tenants, as against disseisors:
 But other real actions, ought to be brought against the Ter. Tenants only,
 and therefore it needs not to shew, that they were Ter. Tenants at the time
 of the Recovery; and also the traverse here is well enough: Another Ex-
 ception was taken, because the Abowry is, That the place in which containeth
 in 100. Acres of Land, the Plaintiff in bar of the Abowry saith, that the place
 in which, &c. contains 35. acres, &c. but that exception was not allowed, for it
 is but matter of form, & is helped by the Statute of 27 Eliz. Another excep-
 tion taken, as to the hundred of Catfel, and doth not shew in certain, if they
 were Cows, or Lambs, or how many of each: which also was disallowed,
 for the Sherif upon Retorno habendo may enquire what cattel they were in
 certain, and so by such meanes the Abowry shall be reduced to certainty.

Mich. 31. & 32. Eliz. in the Exchequer Chamber.

CCLXXVIII. Russel and Prats Case.

Russel brought an action upon the case against Prat, and declared, That
 certain goods of the Testator, casually came to the Defendants hands: Error;
 and upon matter in Law Judgement was given for the Plaintiff, sed quia
 nescitur quod damna, &c. Ideo, A writ of Enquiry of Damages issued, and
 now Prat brought a Writ of Error in the Exchequer Chamber upon the Sta-
 tute of 27 Eliz. cap. 8. But note, That the Judgement was given befoze the
 said Statute, but the Writ of Enquiry of damages was returned after the said
 Statute, & the said Statute doth not extend, but to Judgements given after the
 making of it. And it was moved, That the said Judgement is not to be exami-
 ned here, but by the clear opinion of Anderson, Manwood, Windham, Walmes-
 ley, Gent, and Clark, Justices of the Common Pleas, and Barons of the Ex-
 chequer the Writ of Error lyeth here, by the Statute, for in an action of
 Trespass (as this case is) full judgement is not given, untill the Writ of
 damages be returned, and if befoze the Return of it any of the parties dieth,
 the Writ shall abate: and the first Judgement which is given befoze the A-
 ward of the Writ is not properly a Judgement, but rather a Rule, and or-
 der, and so in a Writ of accoimt, where Judgement is given that the De-
 fendant

Writ of Enquiry of Damages

pendant computet cum querente, he shall not have Error upon that matter for it is not a full Judgement. See 21 E 3. 9. So as to the Judgement in a Writ of Trespass, sci. That no Writ of Error lyeth before the second Judgement after the Return of the Writ of Enquiry of Damages are given: And also it was holden by all the said Justices and Barons, That an Executor shall have an action upon the case de bonis testatoris, casually come to the hands and possession of another, and by him converted to his own use: in the life of the Testator, and that by the Equity of the Statute of 4 E 3. 7. de bonis asportatis in vita Testatoris.

Action, de bonis Testatoris.

Mich 31. & 32 Eliz. in the Common Pleas.

CCLXXVIII. Arrundel and the Bishop of Gloucesters, and Chaffins Case.

Quare Impedit. Sir John Arrundel brought a Quare Impedit against the Bishop of Gloucester, and Chaffin, and counted upon a disturbance to present 1 Novembria. Chaffin, as Incumbent pleaded, That 1 Maii next after the said 1 Novemb. he himself was presented to the Church by the Queen, the presentment to the said Church being devolved unto her by Lapse. Upon which the Plaintiff did demur in Law: and the plea was holden insufficient, for the Plaintiff counted upon a Disturbance to him 1 Novemb. and the Defendant entitled himself to an Incumbency 1 May after, in which case the disturbance set forth in the Count is not answered by traverse, nor confessed, nor avoided: And of that opinion was the whole Court: For the disturbance of which the Plaintiff hath declared is confessed. And afterwards, It was moved by the Queens Serjeants, That the Queen might have a Writ to the Bishop, for the title of the Queen appeareth to be by Lapse which is confessed, But the whole Court were clear of opinion against it, For although it appeareth that he was lawfully presented to the said Church, and so once lawfull incumbent, yet it appeareth also, That the title of the Queen is once executed, and so gon, and nothing remains in the Queen, and now when the Defendant hath lost his incumbency by ill pleading (as he may) as well as by Resignation or Deposition, yet the same shall not turn to the advantage of the Queen, for where the Queen presents for laps, and her Clerk is instituted and inducted, the Queen hath no more to do, but the Incumbent must shift as well as he can for the holding of it, for by what manner so ever he looeth his incumbency the Queen shall not present again, or otherwise it had been, if the Queen be Patron, and afterwards the Plaintiff had a Writ to the Bishop.

Writ to the Bishop.

Mich. 31 & 32 Eliz. In the Exchequer Chamber.

CCLXXIX. The Lord Pagets Case, in a Monstrans de Droit, The Case was,

Thomas Lord Paget, Father of William Paget, was seised of the Pannoy of Burston, and diverse other Pannoyes in three severall Countiees in his demesne as of fee, and so seised by Indenture, between the said Lord of the one part, and Trencham and others on the other part, and in consideration that the said Trencham and others, with the profits of the said Pannoyes should pay his debts, and such summes of money which were contained in such a Schedule, and which he should appoint by his last Will, covenanted to stand seised of the said Pannoyes to the use of the said Trencham

of one Eufal, &c. for the term of four and twenty years, and after the Expiration or end of the said Term of twenty four years, unto the use of the said William Paget, his Son in tail, with diverse Remainders over: And afterwards the said Lord Paget was attainted of high Treason. It was here holden and agreed by all the Justices, and by the Council of both sides, That the uses limited to Trentham, and others are void, for here is not any consideration sufficient to raise an use, for the money which is appointed for the payment of his debts is to be raised of the profits of the Lands of the said Lord, which is not any consideration on the part of Trentham and others: But if the consideration had been, That they with the profits of their own Lands should pay the debts, &c. It had been a good Consideration: It was agreed also, That the term for twenty four years to Eufal is void for want of sufficient consideration: And then it was moved, If this Lease being void, The use limited to the said William Paget, son of the said Lord Paget should begin presently upon the death of the Lord Paget or should extend untill the twenty four years were incurred after the death of the Lord Paget, or not at all. And it was argued, That an use to be raised upon an impossibility should never rise, as if I covenant to stand seised to the use of B and his heirs, after the end of the term for years, which I have in the Mannour of D, whereas in truth, I have not any term in it, the said use shall never rise: so here, No use to the Son can rise, for the lease for twenty four years shall never end, for it never can begin for want of sufficient consideration as is aforesaid; and if the said use in tail should at all arise, it should not rise before the expiration of the said twenty four years. As if I covenant to stand seised of certain Lands to your use when my Son and Heir shall come to the age of one and twenty years, now if my Son dyeth before such age, The use shall not begin before the time in which my Son (if he shall live) should attain unto his said age. Egerton the Queens Solicitor, Uses may be limited to begin at times certain before which they shall not begin: and so in our case, the use in tail is limited to begin when the term of twenty four years, is ended, and therefore untill the Term be ended no use shall rise: and the use is limited to rise upon the end of the time or term of four and twenty years, and not upon the end of the estate; and so William Paget hath begun his Monstrans de Droit, before his time. The Lord Paget had but an estate for life, and if so, Then the Remainders are not contingent uses, but vest presently: as if a man covenant, That after his death his Son, and heir shall have his Lands, now the father hath but an estate for life, and the inheritance is vested in the Son. Cook, I covenant, That after twenty four years ended, I and my heirs will stand seised to the use of my Son, &c. there the use in fee doth vest in my Son presently. So I covenant, That after my death, I and every one who shall be seised, &c. shall be seised of the said Land to the use of my Brother, the said use shall rise to my Brother presently: I devise, That after the death of such a Person, I shall have the Land, nothing passeth to I till the death of the Person; but if Land be devised to a Person for life, and afterwards to another in fee, the Devisee in fee shall have the Land presently. Manwood, A devise or use limited to one for life, the Remainder in tail, the first devisee doth disagree. Cook, the Remainder doth vest presently. Manwood, I devise lands unto one until my son comes of full age. Cook, The remainder doth vest presently. Manw. A use limited to one to begin at Michaelmas, the remainder over, if in the mean time the Lessee obtain the good will of I, which he cannot obtain, the same remainder is not good. And if one covenant to stand seised to the use of Salisbury plain, for the life of I, and after the remainder to A, it is a plain case, That he in the remainder shall take presently. 37 H. 6. 36. Cestuy que usewilled, That his executors should make an estate to A for life, the remainder to C in fee, and A would not take the estate, C shall

Declaration
of uses.

Use cannot
rise out of a
possibility.

have a Subpoena against the Feoffees after the death of A. See there the case; And if Land be devisable, be devised to one for life, the Remainder over to another in Fee, and the Devisee for life doth refuse; Quære, if the Devisee in Remainder shall enter presently, See Fitz. Subpoena; And also he put the Case, where Land is devised to a Son for life, the Remainder over to another in Fee, he in the Remainder shall enter presently, see the same Case in Perkins 108. for the Son never took any thing by the devise, notwithstanding that there is not any particular estate upon which a Remainder can depend, yet the intent of the Devisee shall be observed in as much as it may, and the particular estate limited to the Son is merely void, of which every stranger shall take advantage, &c. And it was resembled to a Case in Drimons Case, where an use in Remainder limited upon good consideration shall be good in Law, although the particular use be not grounded upon good consideration, and so faileth: And he urged a Case alleadged by Popham in the Case of the Earle of Bedford, that if in Cranmers Case, the estate for yeares limited to the Executors, had been limited to Administrators, it had been merely void, and the use in tail limited in tail should begin presently, and that was by reason of the interball betwixt the death of Cranmer, and the taking of the Letters of Administration, in which meane time there is not any person capable, and therefore the Remainder shall best presently, which is a fit case to prove the Case at Bar: And he remembered that in the Argument of Cranmers Case, Lovelace Serjeant, would have an Occupancy in the Case of such a Terme limited to Administrators, quod omnes iusticiarii agverunt, and in the said Case of Cranmer, it was holden that the Lease for yeares being void, the estate in the Remainder did begin presently, without awaiting the effluxion of the yeares, &c. And truly, a Terme imposes in it selfe an Interest, but if the limitation had been after the Terme of twenty foure yeares, &c. the same implyeth but a bare time: And to that purpose he cited the Case 35. H. 8. Br. Exposition, 44. A Lease to B for ten yeares, and it is covenanted betwixt them, that if B pay unto A within the said ten yeares one hundred pounds, that then he shall be seised to the use of B in Fee, B surrenders his Terme to A, and within the said ten yeares payes the one hundred pounds to A, here B shall have Fee, for the yeares are certain; contrary, if the Covenant had been, If he pay within the Terme.

Popham Attorney Generall Contrary, The use shall not go beyond the Contract, and here the Terme doth not best, in that it was limited for want of sufficient consideration, of the Lord Pager, and the intent was not that his son should have possession of the Land before the terme of 24. yeares expired.

use what it is. A use is a thing in Conscience, according to conscience to be guided by the intent of the parties: and upon such Case at the Common Law W. Paget should not have a Subpoena before the yeares expired, and this word (Terme) doth not alter the Case; and there is a great difference betwixt an use raised by Feoffment and an use raised by Covenant, for in the first case the Feoffor doth dispose himselfe utterly, and if it takes not effect to one purpose it shall take effect to another purpose: But in the Case of a Covenant: it is otherwise, for the use riseth according to the contract and not otherwise, and here the Contract is, That W. Paget shall have the Land not immediately after the death of his Father, but after the 24. yeares expired.

Owen Serjeant, It hath bin agreed of both sides, That every use shall go according to the intent of the parties, and here it appeareth, That it was the intent of the Lord Pager, to put all the use out of himself, and I see not any difference betwixt an use raised by Covenant and a use raised by Feoffment for a use limited utrovis modo to Pauls Reeples for the life of A. and after to the use of B in Fee, the first use is void, but the second good, and here the meaning of the Lord Pager plainly appeares, for there is a Proviso in the Adventure, That after the said debts and legacies paid the use limited for

24 years shall cease, and it is expressly averred, that they are paid 11. H. 4. A leasehold for life, the remainder in tail to himself, the Remainder over to a stranger in fee, the meane Remainder limited by A. to himselfe is void, and the remainder over shall be immediate to the estate for life. Egerton, The words of the Indenture, and the intent of the parties are the rules of uses. The first use is void, for the intent of the Lord Paget was void, because contrary to the Law, and Equity, to whom the use for yeares was limited, could not take presently, for his estate is limited to begin after the death of the Lord Paget, and there is a great difference betwixt uses raised by Covenant, and by Feoffment, for when a use is raised by Feoffment, there all is out of the Feoffor, the land is gone, the use is gone, the trust is gone, nothing remaining but a bare authority to raise uses out of the possession, of the Feoffees, and being new uses, there, although some of them be void, yet the other shall stand, but where a use is raised by way of Covenant there the covenantors continue in possession, there the uses limited, if they be according to Law, shall raise and drawe the possession out of him, but if not, the possession shall remaine in him, untill a lawfull use shall arise, which before its time shall not rise for any defect in the precedent use: And here is no Term, therefore no end, for that which hath not a beginning hath no ending, And if there be no estate, then no Term, and if there be so, then it is to be taken for the time of 24. years, which is not as yet expired, and then was there in the Lord Pawlet an estate descendable for 24. yeares, which by the Attainder both acerne unto the Queen. And he cited the Case of 13. Eliz. Dyer. 306. Feoffment to the use of himselfe for life, and afterwards to the use of a woman which he intendeth to marrie, untill the issue which he should beget on the said woman should come unto the age of 21. years, and then to the use of the woman during her widowhood, They are married, the husband dyeth without issue, the wife shall hold the land: But by him, if this use had bin raised by way of Covenant it should be otherwise. Coke, Admits that all the uses be good, yet his meaning was, That the debts and legacies being paid W. Paget should have his land, for it is provided by the Indenture, That when the debts and legacies are paid, the estate for 24. years shall cease. Manwood, the payment of the debts cannot end that which never was, and as to the two first estates, they were never out of him, therefore they came unto the D. by his attainder. Coke, After debts and legacies paid all other estates but the estate of W. Paget cease, therefore William Paget shall have the Land. And the rule of Shelley 35. H. 8. 56. is worthy to be received, scil. That learning is honest, and wished to be used, that every man learned in the Law, doe construe Deeds according to the meanings of the makers. Manwood, A Feoffment to the use of Salisbury Plaine for the life of 16. the Remainder over, the same use shall come into possession presently, for there is not any person capable of the particular estate, but where the first use is limited to a Bastard, the remainder over, there, the Remainder shall not come into possession presently, for the Bastard is a person capable, but not by such forme of conveyance in consideration of naturall affection; Popham, In the case of Bastard, there was an estate for life executed to the Father in possession, and then a Remainder to a Bastard, the Remainder to the Sons lawfully begotten, but here in our Case no estate is created to precede the estate of William Paget, upon which the Remainder can depend.

At another day, It was argued by Coke, It is to be agreed on both sides, That the estate for four and twenty years is meerly void, and also the first use limited to Trencham and others, and it is not reason, that the use limited to William Paget, should expect untill the four and twenty years be expired by effluxion of time, and to that purpose he cited Cranmers case, where an estate in use was limited to Cranmer for life, the Remainder to his Executors for one and twenty years, the Remainder over in tail to his Sonne

and heir, &c. Cranmer is attainted of Treason and Heresie, so as he could not make a Will, or Executors, there it is holden, That the term is void, because no Executors, and that the Remainder in use should vest presently, and should not expect untill the said number of years expire by effluxion of time. A difference hath been put betwixt the case of Cranmer, and the case at Bar, because in Cranmers Case there was a possibility at the beginning that the Term for years might be good, for the term became void by matter ex post facto, sci. By the attainder of him, which disabled him to make Executors, but in the case at Bar, the term for twenty four years was expressly void ab initio: But that difference is without reason, for what reason is there, That the Remainder should be farther off the possession when the estate for years is originally void, then when it becomes void by matter ex post facto? Suppose that the Lord Paget had by Indenture covenanted as above for the two first uses, (being in truth void in Law) and afterwards by another Indenture, reciting, That whereas he had covenanted, That in consideration That A. with the profits of his Lands should pay his debts, &c. to stand seised of the said Lands for his own life: Now he covenants, to stand seised to the use of William Paget, and his Heires, should not he presently be seised to the use of William Paget and his Heires, although the words be, That then and from thenceforth: For I hold it a clear case, that his estate begin presently, being limited to begin upon a void estate, although the limitation be by words de futuro. And to this purpose he cited the case 3 E 6. Br. Lease 61. A man leaseth for years, Habendum post dimissionem inde fact. to J. S. sicutam, where no such demise is made, the same Lease shall begin presently: If an Indenture be made to a Donck, and another, Habendum to the Donck for one and twenty years, and after the end of that, to the other for one and twenty years, the other shall have it presently. And he put a Case 7 E 3. in the new Impression, 19. and in the old Impression 317. Where one Moud brought a Formedon in the Remainder, and counted that one Hamond was seised, and gave the said Tenements to one Robert &c. in tail, and that for want of such issue, that the tenements should return to the said Hamond for life, the Remainder to the Demandant in Fee, and counted further, That Robert is dead without issue, and that Hamond is also dead, &c. It was holden, although that the Remainder reserved to the Donor, be void, yet the Remainder over in Fee is good, &c. And in that case, although that the Remainder in Fee was future, sci. After the death of Hamond, and the estate reserved to Hamond merely void, and that originally, and not by matter ex post facto, yet the Remainder in Fee was good, and should begin presently upon the death of Robert without issue, and should not expect the death of Hamond. 92. Attorney hath given a Rule, That the intent of the parties is the Direction of uses, as also of Wills, and therefore I will put one Case of Wills, 37 H 6. 17. If a man devise Lands to a Donck for four and twenty years, and after the same ended to another in Fee, here the Donck being a dead person cannot take the estate limited to him, and therefore it is void: but the Fee limited to the other is good, and shall take effect presently: If it be so in a Will, why not so also in uses? For the intents of the parties do direct the constructions of both: And our case here is a stronger case, then the case cited 37 H 6. 36. for there where Land is devised to a Donck for life, there may be colour of an Occupant during the life of the Donck, who might take it, although the Donck himself cannot take it, and so the Remainder doth not take effect presently as to the possession, but shall stay till after the death of the Donck: But here is not any colour of an Occupancy, for the estate here is a Lease for years, which cannot admit an Occupant. And see also 37 H. 6. 36. If a man devise that his feoffees shall make an estate to I S for life, the Remainder over to C in Fee, and I S will not take his estate, C shall have

have a Sub-pœna against the Feoffees to make a n estate to him, leaving out I S and see Amy Townsends Case in the Commentaries, where the Husband seised in the Right of his Wife, makes a Feoffment in Fee to the use of himself, and his wife for their lives, the Remainder over to another, the husband dyeth, the wife refuseth the estate limited to her by the husband, she brings Sur cui in vita, not against the heir, but against him in the Remainder, to whom the Land doth accrue by the refusal of the wife, not against the heir of the Feoffor, and I grant, That where an estate in use, or otherwise is to begin upon a condition precedent which is impossible, or against the Law, the estate shall never rise or begin. And here the Case of the Lord Bozroughs, 35 H. 8. Dy. 55. was cited, where the father covenanting in consideration of marriage of his Son, that immediately after his death his eldest Son shall have the possession or use of all his Lands according to the same course of inheritance, as then they stood, and that all persons now seised, or to be seised, should be seised to the said use and intent, and it was holden, That upon that matter no use is changed: But if the words had been Immediately after his death, they should remain then, although the words of the Limitation be In futuro, the use of the Fee shall rest in the Son presently, and the words in futuro ought not to be interpreted, but in benefit of him to whom the use, and estate is limited. 9 Eliz. Dyer 261. A Lease for thirty years, and four years after the beginning of the said term he makes another Lease for years by these words, Noverint, &c. dictis 30. annis finitis & completis, demississe omnia præmissa, to the said, &c. Habendum & tenendum a die consecrationis præsentium, termino prædict. finitæ, usque ad finem 30. annorum. And by the opinion of all the Justices, This new Lease shall commence in possession at the end of the former term, and not before, and if it should not be so expounded, the second Lease should be in effect an estate, but for ten years, which was not the intent of the parties, and every grant shall be expounded most strongly for the grantee, and to his advantage, to which purpose he said he had vouched this Case. Also by him there is not any difference, where the use is limited by way of covenant, or upon a Feoffment: and if a man enfeoffeth B. upon condition that he shall enfeoff C, now if he offer to enfeoff C, and he refuseth, the Feoffor may re-enter, But if the condition were to give to C in tail, then upon such refusal of C the Feoffor shall not re-enter. See 2 E. 4. 2. 19 H. 6. 34. Et si Equitas sit adhibenda in construction of conditions a multo fortiori, in case of Uses: a Feoffment in Fee upon condition, that the Feoffee shall grant a Rent charge to I S who doth it, but I S refuseth, the Feoffor shall not re-enter, for that was not the intent of the condition: If in the principal case, the limitation of the use had been after the expiration of twenty four years, then no use should rise before the twenty four years expire, but where, not the time, but the estate is material, there, if the estate be void, the use shall go to him in the Remainder presently, and shall not stay the time, &c.

Egerton Solicitor, first it is to see, if the use limited to William Paget be good, secondly, if William Paget doth not come before his time to shew his Right: If this use limited to William Paget be a Remainder or an estate to begin upon a contingent, or a present estate, the estates formerly limited being void, and he conceived, that it is not a Remainder, for there is not any estate upon which it may depend; And the words are after the estate for twenty four years ended or expired, that then and from thenceforth to the use of William Paget. &c. so that no use is committed to him before the particular estate is ended, therefore no Remainder, for a Remainder ought to begin when the particular estate begins. Without doubt that was not the intent that William Paget should have the Land during the life of his father, and yet the use limited during the life of his father, was void, and if the Remainder should take effect during the said twenty four yeares against Euall

and his companions, wherefore should it not also take effect against Trenham and the others, to whose use it was limited during the life of the Lord Paget: And here, the use limited to William Paget is to begin upon a collateral contingent, upon which if it cannot rise, it shall not rise at all, and I conceive that the use limited to William Paget, shall never rise, or begin, for it is limited to begin when the terme of twenty four years is ended, and that is never, for that which cannot begin, cannot end, and this Terme is meerly void, Ergo, it cannot begin, Ergo, it cannot end, then this thenceforth cannot be, and so this contingent can never fall, H. 6. & 7. E. 6. A Lease was made for years upon condition, that if the Lessee doe not pay such a summe of money, that he should lose his Indenture, the meaning and sence of these words is not that he should lose the Indenture in parchment, but that he should loose his Terme: The Judgement in an Ejectione firmæ, is, Quod querens recuperet terminum suum, that is to be understood, not the time, but his Interest in the Land for the Terme (and Coke secretly said, that in that Case there is not any contingent, for the estates precedent never began) And as to the Case cited before by Coke, Br. Leases 62. If the last Lease be made by Indenture, reciting the former Lease, certainly the second Lessee shall not be concluded to claime the Land demised presently, but shall tarry untill the yeares of the first Terme be expired by effluxion of time. And as to Mawds Case cited before, there is an estate upon which a Remainder may depend, scil. the estate tail alleadged to Robert, &c. If such as now is limited to William Paget had been limited at the Common Law to a younger Son, the eldest Brother should have the Land in the Interim discharged of any use, and now after the Statute, no use limited to William Paget, before the contingent, where, therefore, is it in the meane time: In the Lord Paget, who being attainted, it accrues to the Queen; and out of the possession of the Queen, this use shall never rise, although that the contingent be performed, for now the use is locked up; A use both consist in privity of the estate and confidence of the person, if these be severed, the use is gone: And here, if the possession be in the Queen, these cannot be seised to another use. Note by Godfrey, that the opinion in Baintons Case, 8. Eliz. Dyer 3. 7. is not Law, and so hath the Law been taken of late; Popham contrary; If before the Statute of 27 H. 8. the Father covenant in consideration of Advancement of his Son to stand seised to the use of IS for life, and after the death of IS, to the use of my Son in Fee, here the estate of IS in the use is void, and yet the estate in the use limited to my Son, shall not take effect before the death of IS; for the estate of my Son is not limited to take effect till after the death of IS, and therefore the possession of the Father is not charged with the use during the life of IS; But if by way of Feoffment IS had refused, the Son should have it presently, and the Father should not have it, for he by his Liberty hath put all out of him, and it was not the intent of the Feoffment, that the Feoffee should have the Land to his owne use: Popham allowed the difference mentioned before out of 2 E. 4. & 19. H. 6. betwixt a Feoffment upon condition to enfeoff a stranger, and to give in tail to a stranger, and that is grounded upon the intent of the parties. And Owen Serjeant put the Case cited before 13 Eliz. Dyer 330. A Feoffment is made by the Husband to the use of himselfe for life, & afterwards to the use of one Anne, whom he intended to marry, for, during, and untill the Son which he should beget on the body of the said woman had accomplished the age of thirty one years, and after such time that such Son should come unto such age unto the use of the said woman, quamdiu, she should live sole, they entered marry, the Husband dyeth without Issue, the wife entreteth immediately, and continues sole, and her Entry was adjudged lawfull, and the estate in Remainder good, although she never had any Son, and thereupon a writ of Error was brought, and the first Judgement was affirmed (and note by Tanfield, and others at the Bar, that that was the most apt

{ The Queen against the Arch-Bishop
of Canterbury, &c.

apt case to the purpose in the Law): the reason of such Judgment was, because they took it, that Deeds ought to be expounded according to the meaning of the parties, and estates in possession: I grant there ought to be a particular estate, upon which a Remainder may depend, but the same is not necessary where the Conveyance is by way of use: And if I covenant that A shall have my Lands to him and his Heirs, to pay my Debts and Legacies, the same is by way of bargain and sale, and nothing passeth without Enrolment. And here the Attainder doth not prevent the use, as it hath been objected by Master Solicitor, for the use doth rise before the Attainder, for William Paget had a Remainder in tail, in the life of his Father, upon the first limitation, &c. Periam Justice, I lease my Lands to you, to begin after the expiration of a Lease which I have made thereof to IS, and in truth he hath not any Lease, the same Lease shall never begin. Manwood cheife Baron, I lease my Lands to you, or grant a Rent to you to begin after the death of Prisoie Serjeant at Law, when shall that begin? Coke, Presently: Manwood, *contra contrarium est Lex.*

Mich 31. & 32 Eliz. In the Common Pleas. Rot. 1832.

CCLXXX. The Queen against the Arch-Bishop of Canterbury, Fane, and Hudson.

The Queen brought a Quare Impedit against the Arch-Bishop of Canterbury, the Bishop of Chichester and Hudson, and counted that John Ashburnham was seised of the abbowlson of Burwash, and was outlawed in an action of Debt, during which Outlawry in force, the Church holden, for which it belongs to the Queen to present: the Arch-Bishop and Bishops plead, that they claime nothing but as Metropolitan and Ordinary: Fane pleaded that King E. 4. Ex gratia sua speciali, &c. and in consideration of faithful service, &c. did grant to the Lord Hastings the Castle and Barony of Hastings, and Hundzere, &c. Et quod ipse haberet omnia bona & catalla tenentium, residentium & non residentium, & aliorum residentium quoruncunque hominum, de & in Castro, Baronia, &c. or within the same, pro munere debito, &c. tam ad sectam Regis &c. quam, &c. Ut legatorem, & quid ipse faceret, per se vel per, his sufficient Deputies, &c. And from him derived to the now Earle of Huntington as Heire; and the said Earle so seised, and the said Ashburnham seised of the abbowlson as appendant to the Mannor of Ashburnham, holden of the said Barony: The Church also, during the Outlawry aforesaid, became void, for which the said Fane, and dictam Ecclesiam usurpando presentavit, the said Hudson, who was admitted and instituted, &c. with this, That idem T. C. verificare vult, that the said Church of Burwash is, and at the time of the grant was, within the Precinct, Liberty, and Franchise aforesaid, and that the said Mannor of Ashburnham, at the time of the grant aforesaid was holden of the said Barony: and the Incumbent pleaded the same Plea: and it by that grant of King Edward the fourth, to the Lord Hastings, scilicet omnia bona & catalla, &c. The presentment to the Church should passe or not, was the question. Shurleworth Serjeant, argued for the Queen, he confessed that the King might grant such presentment, but it ought to be by speciall and sufficient words, so as it may appeare by them, that the intent of the King was to grant such a thing, for the generall words (omnia bona & catalla) will not passe such speciall Chattell in the Kings grant:

And he conceived that by the subsequent words, no Goods or Chattells shall passe by such Grants, but such which may be seised, which the avoidance of a Church cannot be, & quod ipse liceret, per se vel ministros suos ponere se in seisinam, 8 H. 4. 11. 4. 15. the King granted to the Bishop of London, that he should have Catalla felonum & fugitivorum de omnibus hominibus & tenentibus de & in terris & feodis prædict. and of all residents within the Lands and fees aforesaid, Ita quod, si prædict. homines, tenentes & residentes de & in terris & feodis prædict. seu aliqui eorum, seu aliquis alius infra eadem terra & feodis pro aliqua transgressionem, &c. vi. librum, &c. and by Tirwit, By that Grant the goods of those who are put to Penance shall not passe, so of the goods of one Felon de se, vi. 4. E. 3. 5. One being impanelled on the Grand Enquest before the Justices of Oyer and Terminer, pleaded the charter of the King of exemption from Enquests, and because in the said charter was not this clause, licet tangeret nos & heredes nostros, upon challenge, it was rejected, and the party charged and sworn: and if the King grant to me to appropriate an advowson, which in truth is holden of the King, such a grant is void, if there be not speciall words by which it might appeare that the King had notice of it, and that his intent was that the grant should extend unto it, 16 E. 3. Grants 58. & 33 E. 3. Grants 103. So here the Presentment is a speciall chattell, and is not usually intended or thought upon, when men speak generally of goods and chattells: But admit that it be, yet the Plea doth not lye in the Defendants to plead, for they do not derive any Interest under this grant, but are meere strangers to it, and therefore they shall not take any advantage, by laying this grant in the Queens way, for the Queen hath good title against all persons but those who claime under the grant, but that is nothing to the Defendants, for one cannot crosse the title of the King, if he doe not make a title to himselfe, As 39 E. 3. 18. 37 E. 3. 11. If the title of the King be found by a false Office, the party grieved cannot traverse the Kings title without making title to himselfe found by Office, and then the King may choose whether he will maintaine his own title found by Office, or traverse the title of the other. Walmesley, contrary: This Title of Presentment is a Chattell, Rex habebit omnia catalla felonum, &c. A Terme of yeares is a Chattell, so the Lives and Profits of the Lands of men outlawed for felony, so a right of Action for Goods; Therefore a Title to present, and if such a Title accrue to the King, by such generall words they shall passe from the King, and as to that which hath been objected, That the Grant of King Edward the fourth doth not extend only to such Goods and Chattells which may be seised, he cited the Case of 39 H. 6. 35. b. Where the Grantee of a Rent for Terme of yeares granted, omnia bona & catalla sua, tam viva quam mortua, the Rent doth passe, and yet the Grantor cannot put him in seisin of it but ought to expect the day of payment of it. And this Title to present is not a thing in action, for if no disturbance be made, the party may have the benefit of it without any action. Anderson conceived, That this Title to present cannot passe by those generall words (bona & catalla) for they doe not extend to Rights, or things in Action, for such things only which are commonly known and understood, shall passe by such words: By Grant of Goods, Chattells realls will not passe, for when men speake of Goods; Household stuff, money, and such personall things only are understood, So a man cannot be said to have a Chattell but where he is possessed of it, and here this Interest is but *jus presentandi*.

Periam, This Interest is a Chattell, for if the Church become void, and before presentment the Patron dyeth, the Executors shall have the presentment, for it was a Chattell vested in the Testator: It was adjourned.

Hill. 31 Eliz. Rot. 1527. In the Common Pleas.

CCLXXXI. Jones Case.

HEN. Jones had stolen the Plate of Trinity Colledge in Oxford, and by mediation of his friends it was concluded, and agreed that no Evidence should be given against him at the Sute of the Colledge, and that the Colledge should be recompenced for the losse, and two of his friends, Brien and Brice were bounden unto Doctor Underhill, Rector of Lincoln Colledge in Oxford, (but unto the use of the Master and Schollers of Trinity Colledge) upon condition that if the said Obligor paid forty pounds within six moneths after, the said Hen. Jones should be acquitted & released of the troubles wherein he now is, with the safety of his life, that then, &c. In debt upon Obligation The Defendants pleaded that he was indicted at the Assises at Ox. & arraigned upon it, scil. for the stealing of the said Plate, & found guilty thereof, and had his Clergy, and was burned in the hand, and he demanded Judgement of this Action, upon which there was a Demurrer: Wind. If the words had been to pay the money, after that Henry Jones should be released and acquitted of the troubles in which he now is without any more, the Defendants had been bounden to pay the money. Periam, If the words of the condition had been, that after Henry Jones should be acquitted of the Felony, then no money payable, but here the words are with safety of his life: but here he conceived, that the intent of the Obligation was, that no Evidence should be given, and so to save his life from the Gallows, for which the Defendants might have shewed the speciall matter, and averred that the Obligation was made for the discharge of a felon, and so against the Law &c. but now, they cannot take advantage of it, and afterwards Judgement was given for the Plaintiff.

Pasc. 31. Eliz. In the common Pleas.

CCLXXXII. Castle and Oldmans Case.

Debt.

CASTLE brought Debt against Oldman for a pain assessed in a Court Baron, and declared That the Defendant was presented at the Court Baron for such an offence, and if he did not amend it before the next Court, he should pay such a pain: And at the next Court it was presented, That the Defendant had not amended it, and so he had incurred the pain upon which the Action is brought, and now the Defendant would wage his Law, and it was much doubted whether wager of Law lay in the Case. Shuttleworth, 13. H. 7. 31. Upon a Recotery in a Court Baron, wager of Law lyes not, by Conisby, which Periam denyed; And by him upon an account by another hand, it doth not lye, for it is a matter of which the Country may have Conscience, so here the matter is notorious, which lyes in the knowledge of all the Jurors who presented it: And by him, the pain ought to be assessed, which Anderson denyed. For there is a difference betwixt an amercement and a paine, which Windham granted. And see for the amercement in the Lect, 10 H. 6. 7. 12 R. 2 Ley. 43. But in a Court Baron, because it is not a Court of Record; so in Debt upon an Arbitrament, the Law lyes. And Waler one of the Secondaries shewed

unto the Court a President, 6 Eliz. Where debt was brought by Sir Thomas Tyndall, upon a pain forfeited for the breaking of a By-law in a Court Baron against Tyler, and the party was received to Wage his Law.

Pasch. 31. Eliz. In the Common Pleas.

CCLXXXIII. Thetford and Thetfords Case.

Partition.

IN *Wass* the Plaintiff declared, upon the demise of the moiety of the *Hanno*, whereof part of the Tenants were Copy-holders, and part Free-holders, and that *A* was seised of the *Hanno*, and had issue two Daughters, and dyed seised, the Daughters entred, and made partition of the Demeans only, but the Services of the Free-holders and Copy-holders did remaine in Common; One of the Daughters took Husband, the Husband and the Wife make a Lease of the moiety of the *Hanno* to the Plaintiff for yeares by word, rendering Kent, the Lessee entred into the Demeans allotted to the Wife of the Lessee. The Husband dyed, and the Wife brought an Action of *Wass*. Anderson, By the partition the Demeans are now become in grosse, and severed from the *Hanno*; And if partition be made of a *Hanno*, soas the Demeans be allotted to one Sister, and the Services to the other, now the *Hanno* is dissolved, yet if the other Sister dyeth without issue, and her part descendeth to the other, now it is become a *Hanno* againe, which *Windham* and *Periam* granted, See 12. H. 4. 271. And Anderson was of opinion, that the moiety of the Demeans did not passe by the words of the moiety of the *Hanno*, as if one seised of a *Hanno* maketh a Feoffment in Fee of part of the Demeans, and afterwards re-purchase them, and then makes a Feoffment of the whole *Hanno*, and Demeans re-purchased, will not passe thereby, for they were once severed from the *Hanno*, and not re-united by the purchase. *Periam*, Although that in truth it is not a *Hanno* nor any part of a *Hanno*, yet if it hath been reputed, the moiety of the *Hanno*, it shall passe by such name, which Anderson granted, but it is not like to our Case. *Periam*, This is an ancient partition, as appeareth by the Verdict, ten yeares past, and also it hath been reputed the moiety of the *Hanno*, therefore it shall passe, *Windham* concessit, *Periam*, The intent of the Grantor is the best Interpreter of these words, without relying strictly upon the words. Anderson, If we shall take the intents of men for Law, we shall fall into many confusions in our proceedings, but the Law is to judge of the meanings of men by their words, ever in the constructions of Wills, the intent of the Testators have not had further favour then the words have given leave. As to the other point: It was argued by *Walmesley*, that the Lease made by the Husband and Wife without Deed was void, See 1. Ma. Dyer 91. And if the Wife after the death of her Husband accepts the Kent upon such a Lease reserved, it shall not bind her, for the consent of the Wife ought to be at the beginning of it, which cannot be without Deed: Anderson conceived that the sense is not merely void, See 15. Eliz. Smith & Stapletons Case, Plowd. 431. *Periam*, The matter is clear, for although the Plaintiff declares generally of a Lease made by the Husband and Wife, yet the Jury hath found, that it was by Indenture, and that is pursuant enough. And if the Husband and wife make a Feoffment of the wifes Land, it is the Feoffment of both of them, which *Walmesley* granted: It was adjourned.

Trinit. 31. Eliz. in the Common Pleas.

CCLXXXIV. Smallwood and others, against the Bishop of Lichfeild and others, Quare Impedit.

Humphrey Smalwood, Richard Say, and Thomas Say, Executors of William Say, brought a Quare Impedit against the Bishop of Coventry and Lichfeild, and M Incumbent, quod permitat presentare ad Archidiaconatum de Derby, which was void, Et ad presentationem Testatoris in vita sua, & nunc in retardationem executionis Testamenti, did belong to the Executors: Exception was taken because these words (In retardationem executionis Testamenti) could not be applyed to a disturbance in the life of the Testator. Windham, There is not any writ in the Register of Quare Impedit, upon a disturbance made to the Testator. Anderson, What then: therefore no remedy because no writ according to his speciall matter, 25 E. 3. 25. Goods are taken out of the possession of the Testator, upon which the Executors brought Trespasse. In retardationem executionis Testamenti, the writ abated, for it ought to be where the Executors themselves were possessed: Periam, The Abbotsdon it selfe is valuable, not the presentment, therefore it cannot be said in retardationem; Periam, Before the Statute of 4 E. 3. 73. In Case where damages were only to be recovered, the Action, moritur cum persona, but where the thing it selfe was to be recovered, there the Action accrued to the Executors: Anderson, 7 H. 4. 73. Ejectione firmæ, of an Ejectment made unto the Testator was maintained by the Executors by equity of the Statute of 4 E. 3. cap. 6. And by the opinion of the whole Court, the Executors might have a Quare Impedit upon a disturbance made to the Presentment: It was objected also, that a Quare Impedit doth not lye of an Archdeaconryship, for it is not locall, nor any Indenture made of it, but is only a matter of function, but it was not allowed, for an Archdeacon hath Locum in choro: And by the Statute a Quare Impedit lye of a Chappell, and by the equity of it, of a Priebe, &c. See the Statute of West. 2. Quare Impedit of a Chappell, Priebe, &c. It was moved, if the Executors had presented after the death of the Testator, whether the Archdeacon ought to receive the Clerk of the Testator, or of the Executors, and the opinion of the Court was, That the Bishop should have election therein: And afterwards Judgement was given, that the writ should abate, for the disturbance to the Testator cannot be supposed new matter (In retardationem executionis Testamenti) But yet it was agreed, that the Executors might have their speciall writ upon their Case for the said disturbance.

Trin. 31 Eliz. In the common Pleas.

If an Action brought against one as Executor, who pleaded that he refused, Upon which the parties were at Issue: The Bishop did certifie, quod non recusavit, where as in truth he had refused before the Commissary: Fenner Serjeant moved, to have the advise of the Court upon that matter, and argued that the Court ought to write to the Commissary: Which was denyed by the whole Court, for he is not the Officer unto the Court to that purpose, but the Bishop himselfe is the Officer: And the party cannot aver against the certificate of the Bishop, no more then against the Returne of the Sheriff: And the Court was also of opinion, that the only remedy for the Defendant was by Action upon the Case against the Bishop for his false Certificate: But it was moved, That the Issue joyned upon the refusall ought to be tryed.

ed by Jury, and not by the Certificate of the Bishop, and so was the opinion of Windham and Walmesley. Periam, Where the Issue is whether the Executoꝝ did refuse befoꝛe such a day, oꝛ after, there the tryall shall be by Jury, contrary where the Issue is upon refusall generally, because the refusall is befoꝛe him as a Judge, as also is Resignation.

Mich. 31. Eliz. in the Common Pleas.

CCLXXXVII. Sutton, and Holloway and Dickons
Case.

In an Ejectione firmæ by Richard Sutton against Robert Holloway, and Thomas Dickons, upon not guilty pleaded, the Jury found this speciall matter, scil. That the said Thomas Dickins had not any thing in the Lands in question at the time of the making of the Lease, upon which the Action is brought, scil. Who leased by Indenture to the Plaintiff foꝛ certain years, who entred, and afterwards the said Thomas Dickins, contra Indenturam suam prædictam intravit upon the Plaintiff, and, If the same should be a good Lease by Estoppel was the question; the Jury having found the truth of the matter, scil. That the Lessor had not any thing at the time of the demise, Walmesley objected, That the Jury ought not to find the Indenture, because it was not pleaded, foꝛ the Plaintiff doth not declare upon any Indenture, but the Exception was not allowed, but in old time the Law was such, 22 E. 3. but at this day the Law is otherwise, See Scholashra's Case, 14. Eliz. Plowd. 411. But where a Release oꝛ other writing ought to be pleaded, there it ought to be shewed to the Court. Walmesley, In rei veritate, the Lease is void, foꝛ a man cannot let Land in which he hath not any thing: but in respect of the parties themselves, the Lessors and Lessee both are concluded to say, That is no Lease, foꝛ none of them can say the contrary: But here the Jury which is a third person, is not estopped to say the truth, but they may find the speciall matter and the truth of the Case, and the Estoppel hath not place there, but, the truth of the matter appearing to the Judges, the Judges ought to adjudge upon the same, scil. If a man may make an effectual lease of Lands, in which he hath not any thing. At another day it was moved by Shute. Although that the Jury be not estopped, yet the parties themselves are estopped, foꝛ the Law makes the Estoppel betwixt the parties, and the Law will not permit a man to say any thing against his own Deed being indented, noꝛ any matter contained in it, Periam and Anderson clearly foꝛ the Plaintiff, That it is a Lease by Estoppel and by Periam. It hath been adjudged in the Kings Bench, That the Jury in such case are compellable upon paines of Attaint to finde the Estoppel: Walmesley, Here the Estoppel is out of Doors, foꝛ the truth of the matter disclosed by the Verdict, not by the parties only maketh the Estoppel, and he much relied upon the case of Littleton, 149. 2. A woman; seised of Lands in Fee, taketh a Husband. who alieneth to another in Fee, the Alienee leaseh to the Husband and Wife foꝛ their lives, now the Wife is remitted, and seised in Fee as befoꝛe, here if the Alienee, i. e. the Lessor, brings an Action of Waste against the Husband and Wife, the Husband cannot bar the Plaintiff by the truth of the matter, scil. the Remitter of his wife, foꝛ he is estopped to say against his own Feoffment, and his re-taking of the particular estate to himselfe and his Wife: But if in an Action of Waste, the Husband make default at the Grand Disceſse, and the Wife prayeth to be received, shee may well shew the whole matter: So here the Jury: Windham, The Plaintiff ought to have demurred upon the Evidence: Periam, What if the Defendant will not joyn with the Plaintiff in the Demurrer: Windham, there the Court ought to overrule them, and if the

Estoppel.

the parties had demurred upon the Evidence, we should have adjudged upon that Evidence, that a man cannot lease lands in which he hath not any thing: And here, the Escofell could not be pleaded, for the Defendant hath pleaded the generall Issue, but if he had pleaded Non demisit, then the Escofell should have holden place.

Pasch. 31. Eliz. in the Common Pleas.

CCLXXXVII. Milles and Snowballs Case.

A Inro; did surmise at the Bar, that he was a Tenant in Ancient demesne, and had his Charter in his hand, and prayed to be exempted from the Jury and discharged, but the Court did not regard it, but caused him to be sworn. And Windham said, that he might have his remedy against the Sheriff, and Nelson Preignothorpe said, if he had made default and lost Issues, he might shew his Charter in the Exchequer upon the Amercement estreated, and there he should be discharged: In that Case, it was holden by the Court, That if a Feoffment be made of a House, and the Deed be delivered in the House without other circumstance, the same doth not amount to a Liberty of seisin, but if he doe any act by which the intent of the Feoffor appear, that the Feoffee should have Liberty and Seisin, as if the parties goe of purpose to the place intended to passe, to the intent that the Deed may be delivered in that kind, the same doth amount to a Liberty, by Anderson, and the whole Court.

Priviledge of
Exemption
from Juries.

Livery of se-
isin.

Mich. 32. and 33. Eliz. In Communi Banco.

CCLXXXVIII. Bradstocks Case.

Robert Bradstock seised in Fee of certain Lands, made a Feoffment in Fee to the use of himselfe in tail, and for want of such Issue to the use of John Bradstock his Brother in tail, and for want of such Issue to the use of Henry Bradstock, another Brother in tail, Provided alwayes, That if the said John or Henry doe goe about to avoid any estate or demise by copy, made or to be made of the Premises, or any part thereof, that then his estate should cease. Robert dyed without Issue, John entred and levied a Fine, Surconusans de droit come ceo, &c. of the Land: And the opinion of the whole Court was, That this Fine was not any offence against the said Proviso, for these words (made or to be made) doe not extend to estates made or limited by the said Feoffment, but only to estates befoze made, and to be made after wards.

Estates.

Conditions.

Mich. 32 & 33. Eliz. In Communi Banco.

CCLXXXIX. Long and Hemmings Case.

In a Quare Impedit by Long against Hemming and the Bishop of Gloucester, of the Church of Frombiller, upon the pleading the Issue was, If Thomas Long Father of the Plaintiff did enfeoff the Plaintiff of the Parsonage of Frombiller, to which the Abbotsion of the said church was appendant before he granted the Abbotsion to one Strengcham who granted it to the Defendant, or not. And the Jury gave a speciall Verdict, scil. That the Abbotsion was seised of a capitall Messuage in Frombiller, and of one hundred Acres

Quare Impedit.

Acres

Acres of Land there, And that there was a Tenancy holden of the said capitall Messuage by such Services, and that the said capitall Messuage had been known time out of mind, by the name of the Mannor of Frombillet, and that the Abbowlson was appendant to it, and conveyed the said capitall Messuage and Abbowlson to the King by the dissolution, and from the King, to the said Thomas Long, who so seised, without any Deed did enfeof the Plaintiff of the said Mannor, and made Libery and Seisin upon the Demesnes, And that the said Thomas Long by his Deed made a grant of the said Abbowlson, to the said Strengcham, and afterwards the Freeholder attorned to the Plaintiff: And by the clear opinion of the whole court, here is a sufficient Mannor to which an Abbowlson may be well appendant, and that in Law, the Abbowlson is appendant to all the Mannor, but most properly to the Demesnes, out of which at the commencement it was derived, and therefore by the attornment afterwards, within construction of the Law, shall have relation to the Libery, the Abbowlson did passe included in the Libery: And the grant of the abbowlson made meane between the Libery, and the attornment was both, and afterwards Judgment was given, and a writ to the Bishop, granted for the Plaintiff.

CCLXXXX. Mich. 32 & 33 Eliz. In Communi Banco.

Debt.

A Made a Bill of Debt against B for the payment of twenty pounds at four dayes, scil. five pounds at every of the said four dayes, and in the end of the Deed, covenanted and granted with B, his Executors and Administrators, that if he make default in the payment of any of the said payments, that then he will pay the residue that then shall be unpaid, and afterwards A failes in the first payment, and before the second day B brought an action of Debt for the whole twenty pounds. It was moved by Puckering Serjeant, That the Action of Debt did not lye before the last day incurred; And also if B will sue A before the last day, that it ought to be by way of covenant, not by Debt: But by the whole Court, the action doth well lye for the manner, for if one covenant to pay me one hundred pounds at such a day, an action of Debt lyeth, a fortiori, when the words of the Deed are covenant and grant, for the word covenant sometimes sounds in covenant, sometimes in contract, solum subiectum materii.

Mich. 32 & 23 Eliz. In Communi Banco.

CCLXXXI. Lancasters Case.

A Information was against Lancaster for buying of pretended Rights and Titles upon the Statute of 32 H. 8. And upon not guilty pleaded. It was found for the Plaintiff, and it was moved in arrest of Judgment, because the Informer had not pursued the Statute, in this, that it is not set forth, that the Defendant nor any of his Ancestors, or any by whom he claimed, have taken the profits, &c. and the same was holden a good, and materiall Exception by the Court: and although it be layed in the Information, that the Plaintiff himself hath been in possession of the Land by twenty years before the buying of the pretended Title, for that is but matter of argument, and not any expresse allegation. for in all penall Statutes the Plaintiff ought to pursue the very words of the Statute, and therefore by Anderson, It hath been adjudged by the Judges of both Benches, that if an Information be exhibited upon the Statute of Usury, by which the Defendant is charged for the taking of twenty pounds for the Loane and for bearing of one hundred pounds for a yeare, there the Information is not good, if it be not alleaged in

in it, that the said twenty pounds was received by any corrupt or deceitfull way or means: And in the principall Case, for the Cause aforesaid, Judgment was arrested.

Mich. 32, & 33 Eliz: in the Common Bench.

CCLXXXII. Bagshaw and the Earle of Shrewsburies Case.

Bagshaw brought a Writ of Annuity against the Earle of Shrewsbury, ^{Annuity.} for the arrearages of an Annuity of twenty Marks per annum, granted by the Defendant to the Plaintiff, Pro Consilio impenso & impendendo, The Defendant pleaded, that befoze any arrearages incurred, he required the Plaintiff to do him Service, and he refused, The Plaintiff by replication said, that befoze the refusall, such a day and place the Defendant died, discharged the Plaintiff of his Service, &c. And the opinion of the Court was, that the Plea in Bar was not good, for he ought to have shewed for what manner of Service to doe, the Plaintiff was so retained, and for what kind of Service the Annuity was granted: and then to have shewed specially what Service he required of the Plaintiff, and what Service the Plaintiff refused. Another matter was moved, If the discharge shall be peremptory, and an absolute discharge of the Service of the Plaintiff, and of his attendance, so that as afterwards the Defendant cannot require Service of the Plaintiff. And by Walmesly Justice, it is a peremptory discharge of the Service, for otherwise how can he be retained with another Master: and so he should be out of every Service. Windham contrary, for here the Plaintiff hath an annuity for his life, and therefore it is reason that he continue his Service for his life, as long as the annuity doth continue, if he be required: But where one is retained but for one or two yeares, then once discharged, is peremptory and absolute.

Mich. 31. and 32. Eliz. in the Common Bench.

CCLXXXIII. Matheson and Trots Case.

Betwixt Matheson and Trot the Case was, Sir Anthony Denny seised of Certain Lands in and about the Town of Hertford, holden in Socage, and of others Mannors, Lands, and Tenements in other places holden in chief by Knights service, and having Issue two Sons, Henry and Edward, ^{Devise.} by his last Will in writing, devised the Lands holden in Hertford to Edward Denny his younger Son in Fee, and died seised of all the Premises, Henry being then within age: After Office was found without any mention of the said Devise, the Queen seised the body of the Heire, and the possession of all the Lands whereof the said Sir Anthony died seised, and leased the same to a stranger, during the Minority of the Heire: by force and colour of which Lease the Lessee entred into all the Premises, and did enjoy them according to the Demise. And the Heire at his full age sued Liberty of the whole, and befoze any entry of the said Edward in the Land to him devised, or any entry made by the said Henry, the said Henry at London, leased the said Lands by Deed indented to I. S. for years, rendering Rent, by colour of which the said I. S. entred, and payd the Rent diverse years to the said Henry: And afterwards by casualty the said Henry walked over the Grounds devised by him, in the company of the said I. S. without any speciall entry or claim there made, I. S. assigned his Interest to I. D. who entred in the Premises, and payd the Rent to the said Henry, who died, and afterwards the Rent was payd to the Son and Heire of Henry: And after four and twenty years after

Discent, where
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trie.

the death of the said Sir Anthony, the said Edward entred into the Land to him devised by the said Devise; and leased the same to the Plaintiff, &c. And it was moved here, if this dying seised of Henry of the Lands in Hertford, and discent to his Heire, should take away the Entry of Edward the Devisee. And by Anderson clearly, If here upon the whole matter be a discent in the Case, then the Entry of Edward the Devisee is taken away, although that the Devisee at the time of the discent had not any Action or other remedy, for it shall be accounted his folly that hee would not enter, and prevent the discent. But VVindham, Periam, and VValmely Justices, were of a contrary opinion, for a Devisee by a Devise hath but a Title of Entry, which shall not be bound by any Discent, as Entry for Mortmain, for Condition broken, And after long deliberation they all agree, that there was not any Discent in the Case, for by the Devise, and the death of the Devisee, the Frank-tenant in Law, and the Fee was vested in the Devisee Edward: And then when the Queen seised, and leased the same during the Sonage of Henry, and the Lessee entred, he did wrong to Edward, and by his Entry had gained a tortious Estate in fee, although he could not be said properly a Disseisor, nor an Abator; And afterwards when Henry after his full age, when by his Indenture he leased without any speciall Entry, ut supra, and by colour thereof the Lessee entred, now he is a wrong Doer to Edward the Devisee and by his Entry had gained a wrongfull Possession in Fee: and then the paying of the Rent to Henry, nor the walking of Henry upon the Land without any speciall claim, did not gain any Heisin to him: and so he was never seised of the Land, and could never dye seised, and then no Discent; and then the Entry of Edward was lawfull, and the Lease by him made to the Plaintiff was good: And so Judgment was given for the Plaintiff.

Mich. 32. & 33. Eliz. in the Common Bench.

CCLXXXIV. Greenwood and Weldens Case.

Replevin.

In a Replevin between Greenwood and Welden; The Defendant made Confessans as Bayliff to John Cornwallis, and shewed how that seven acres of Land called Pilles, is locus in quo: and at the time of the taking were holden of the said Cornwallis by certain Rent, and other Services: And for Rent arreare he made Confessans, as Bayliff to Cornwallis. The Plaintiff pleaded out of the Fee of Cornwallis, upon which they were at Issue: And it was found that the Plaintiff is seised of seven acres called Pilles, holden of Cornwallis, ut supra: But the Jury say, That locus in quo doth contain two acres, which is called Pilles, and these two acres are, and then were, holden of Agmondesham of the Middle-Temple: And if upon the whole matter, videbitur Curiz, &c. And by the opinion of the whole Court, out of his Fee upon that matter is not found, for although it be found, that the two acres be holden of Agmondesham, yet it may be that they are within the Fee of Cornwallis, for it may be that Cornwallis is Lord Paramount, and Agmondesham Mesne, and then within the Fee of Cornwallis: And therefore for the uncertainty of the Verdict, a Venire facias de novo was awarded.

Mich. 32. & 33. Eliz. in the Common Bench.

CCLXXXV. Bishop and Harecourts Case.

Assumpsit.

In an Action upon the Case, The Plaintiff declared, that the 5. Junii, 30 Eliz. the Defendant (in consideration that the Plaintiff the same day and year, sold and delivered to the Defendant a Horse) did promise to pay the Plaintiff

plaintiff a hundred pounds in Trinity Term then next ensuing, and shewed that the Term began 7 Junii after: And upon Non assumpsit pleaded, it was found for the Plaintiff. And it was moved in arrest of Judgment, That it appeareth upon the Declaration, that the Plaintiff hath not cause of Action, for the Trinity Term intended is not yet come, for the day of the Assumpsit is the fifth of June, and the fourth day was the first day of the said Term, scil. the day of Whittines, and the seventh day 4. die post, and then the promise being made at the day aforesaid, after the Commencement of the said Term, the same is not the Term intended, but the Plaintiff must expect the performance of the promise untill a year after: And of that opinion was Anderson, but the three other Justices were strongly against him to the contrary, for by common intendment amongst the people, the Term shall not begin untill 4. die post, and so it is set down usually in the Almanack; And afterwards Judgment was given for the Plaintiff.

CCLXXXVI. Mich. 32. & 33. Eliz. in the Common Bench.

Cooper Defendant came to the Bar, and shewed that A. Tenant in tail, the Remainder over to B. in Fee. A. for a great sum of money sold the Land to T. S. and his Heires, and for assurance made a Feoffment in Fee, and levied a Fine to the said I. S. to the use of the said I. S. and his Heires: And note, that by the Indenture of Bargain and Sale, A. covenanted to make such further Assurance within seven daies, as the said I. S. or his Heires, or their Council should devise: And shewed, that before any further assurance was made, the said I. S. died, his Son and Heire being within age: And now by writ of the Council, and of the Executors of the Infant, it was devised that for such further assurance, and cutting off the Remainder, a common Recovery should be suffered, in which the said Infant should be Tenant, to the Precise, and should vouch the Vendor, and because that the said Term of seven yeares is almost expired, and that the said Recovery is intended to be unto the use of the said Infant and his Heires, it was prayed that such a Recovery might be received and allowed. And two Presidents in such Case were shewed in the time of this Queen; one the Case of the Earl of Shrewsbury, and the other one, Wiseman's Case: But the Justices were very doubtful what to do: But at last upon good assurance of people of good Credit, that it was unto the use of the Infant, and upon the appearance of a good and sufficient Guardian for the Infant in the Recovery, who was of ability to answer to the Infant if he should be deceived in the passing of that Recovery; and upon consideration of the two Presidents, and upon Affidavit made by two Witnesses, that the said intended Recovery was to the use of the Infant, the Recovery was received, and allowed.

Common Recovery suffered by an Infant by his Guardian.

Mich. 32. & 33. Eliz. in the Common Bench.

CCLXXXVII. Cottons Case.

It was found by Special Verdict, that Berwick and Tisdall leased of certain Lands, conveyed the same to Sir Thomas Cotton for life, the Remainder to William Cotton, & primogenito filio suo, & hæredi masculino & sic de primogenito ad primogenitum dict. William. the Remainder to the right Heires of the body of Sir Tho. Cotton, and William Cotton lawfully issuing, the Remainder to the right Heires of Sir Thomas Cotton: William had Issue a Son borne here in England, and went beyond the Sea to Antwerp, and there continuing, and his Son being within age in England, Sir Thomas Cotton

Fines levied 16 shes.

Estate;

levied a fine of all the Land, sur conusans de droit come ceo, &c. And after wards by Indenture covenanted to stand seised to the use of himself for life, and afterwards to the use of Robert Cotton his son in fee: William died at Anwerp, his said son being within age in England, Sir Tho. Cotton died, Robert entered, and leased the Lands for yeares to Sory, and the Infant son and Heire of William leased the Land to one Chewoe at Will, who entered and ousterd Sory, who thereupon brought Ejectione firme. It was here holden by the Court, that Sir Thomas Cotton was Tenant for life, the Remainder to William for term of his life, the Remainder to the Heires of both their bodies living: So as unto one Poverty Sir Thomas Cotton had an Estate-tail dependant upon the said Estates for life; and so the fine levied by him was a Bar to the Issue of William for a Poverty. And as to the other Poverty they held that the said fine was not any Bar, but that the party interested at the time might avoid the fine at any time during his Sonage, and five yeares after, for William his father was not bound by the Statute of 4 H. 7. because at the time of the fine levied, he was beyond the seas, and although he never returned but died there, yet by the equity of the Statute his Issue shall have five yeares after his death to avoid the fine, if he were of full age, and if he were within age, then during his Sonage, and five yeares after. At another day the Case was argued and put in this manner, viz. Lands were given to Sir Thomas Cotton for life, without Impeachment of Waste, the Remainder over to Cheney Cotton his eldest son, & primogenito filio & heredi Mascato, of the said Cheney, & sic de primogenito filio in primogenitum filium, the Remainder to the Heires Males of the body of the said Cheney, and for want of such Issue, the Remainder to William Cotton his second son, & primogenito filio, in primogenitum filium, the Remainder over to the said Sir Thomas, and the said William, and the Heires Males of their bodies lawfully begotten. Cheney Cotton died without Issue, William having Issue, went beyond the Sea, Sir Thomas Cotton, 19 Eliz. levied a fine with Proclamation, and afterwards William the father died in Anwerp, his son being within age, Sir Thomas by Indenture limited the use of the fine to himself for life, the Remainder over to Robert Cotton his third son in Tail, Sir Thomas died (but it hath not appear at what time) William the son being yet within age entered (but non constat quando) and 31 Eliz. leased the Lands to the Defendant at Will. Drue Serjeant argues for William Cotton, And he conceiveth, that William the father had an Estate-tail, and then the entry of William the son was congeable for the whole: But admitting that it is not an Estate-tail in William the father for the whole, yet he hath by the second Remainder an Estate-tail in the Poverty, and then his Entry good as to one Poverty; and then Robert being Tenant in Common of the other Poverty, his Lessee without an actual Doffer cannot maintain an Ejectione firme against the Lessee of his Companion. And he conceiveth here is a good Estate-tail in William Cotton by virtue of the Limitation to William, & progenito filio & heredi Mascato ipsius Guliel. & sic de primogenito filio in primogenitum filium, &c. for according to the Statute of V. 2. the will of the Donor ought to be observed, and here it appeareth that the intent of the Donor was to create an Estate-tail, although the words of the Limitation do not amount to so much. And the Estates mentioned in the Statute aforesaid, are not Rules for Entails, but onely Examples, as it is said by Trew, 33 E. 3. F. Tail 9. and see Robeiges Case, 2 E. 2. 1 Fitz. Tail: and 5 H. 3. 6. Land given to A. and B. uxori ejus, & heredibus eorum & aliis heredibus dicti A. si dicti heredes de dictis A. & B. excentes obierint sine heredibus de se, &c. and that was holden a good Entail; so a gift to one and his Heires, si heredes de carne sua habuerit & si nullo de carne sua habuerit revertatur terra, and admodum a good tail: So 39 E. 3. 20. Land given to Busham and Will, & ali heredi

Tails.

de corpore suo legitime procreat. & uni heredi ipsius heredis tantum. And that was holden a good Taile; and so he conceived in this Case, that although the words of the Limitation are not apt to create an Estate-tail according to the phrase and stile of the said Statute of West. 2. yet here the intent of the Donor appears to continue the Land in his Name and blood, soz William the Son could not take with his Father by his Limitation, soz he was not in rerum natura, and therefore all shall vest in William the Father, which see 18 E. 3 Fitz. Feoffments & Fait. 60. Now it is to see, if upon the Limitation to Sir Thomas Cotton and William his Son, by which the Remainder is limited to Sir Thomas Cotton and William, and the Heires Males of their bodies issuing, the said Sir Thomas Cotton and William have a joint Estate-tail, in respect that the Issue of the body of the Son, may be Heire of the body of the Father: and so because they might have one Heire which shall be inheritable to his Land, it shall be one entire Estate-tail in them: But he conceived that they are severall Estate-tails, and that they are Tenants in Common of an Estate-tail, 3, & 4 Phil. & Mar. Dyer 145. Land given to the Father and Son, and to the Heires of their two bodies begotten, the Remainder over in Fee, the Father dieth without other Issue, then the Son only, and afterwards the Son dieth without Issue, a stranger abates: Or if the Son hath made a Discontinuance, if he in the Remainder shall have but one of two severall Formedons was the Question. And by Saunders, Brook, and Brown, but one Formedon, and Quare left of it; yet admitting that, yet notwithstanding that, it might be that they had severall Estate-tails, 17 E. 3. 51. 78. Land given to a man and his Sister, and to the Heires of their two bodies issuing, they have severall Estate-tails, and yet one Formedon. And see 7 H. 4. 85. Land given to a man and his Mother, or to her Daughter in Tail, here are severall Entails. And here in the principall Case, Sir Thomas Cotton hath one Power in Tail expectant upon his Estate for life: and therefore as to the Power of Sir Thomas Cotton he is bound by the Fine. And the other Power is left in the Son, who may enter for a Possessure upon the alienation made by his Father, as well in the life of the Father, as afterwards. Now after this Fine levied, the entry of William the Son by virtue of his Remainder is lawfull after the death of Sir Thomas, although that William the Father was beyond the Sea at the time of the Fine levied, and there afterwards died, William the Son being within age. The words of the Statute of 4 H. 7. are, Other then Women Covert, or out of this Realm, &c. so that they or their Heires make their Entry, &c. within five yeares after they return into this Land, &c. So that by the bare letter of the Act, William the Son hath not remedy, nor release by this Act against the Fine, because that William the Father died beyond the Sea, without any return into England, yet by the Equity of the Statute he shall have five yeares to make his Claim, although his Father never return, soz if such literall construction should be allowed, it should be a great mischief, and it should be a hard Exposition, soz this Statute ought to be taken by Equity, as it appeareth by diverse Cases, 10 H. 8. 6. My Uncle doth disesse my Father, and afterwards levies a Fine with proclamations: my Father dieth, and after within five yeares my Uncle dies, that Fine is no Bar to me, yet the Exception doth not help me, soz I am Heire to him that levied the Fine, and so privy to it, but my Title to the Land, is not as Heire to my Uncle but to my Father: So if an Infant after such a Fine levied, dieth before his full age, his Heir may enter within five yeares after, and yet that Case is out of the Letter of the Statute. And by Brown and Sanders, If the Disseisor dieth, his Wife enfiend with a Son, the Disseisor leveth a Fine, the Son is born, although this Son is not excepted expressly by the words, because not in rerum natura at the time of the Fine levied, &c. yet such an Infant is within the equity and meaning of the said Statute. See the Case betwixt Stowel and Zouch, Plow. Com.

366. And by him, It was holden, 6. Eliz. that an Infant brought a Form-don within age, and adjudged maintainable, although the words of the Statute be, That they shall take their Actions or lawfull Entries within five years after they come of full age: And he also argued, that here, when Sir Thomas being Tenant for life, levied a fine, which is a Forfeiture, he in the Remainder is to have five years after the fine levied, in respect of the present forfeiture, and also five years after the death of the Tenant for life: And that was the case of one Some adjudged accordingly in the Common Pleas: It hath been objected on the other side, That the Defendant entering by coloz of the Lease at Will made to him by William who was an Infant, that he was a Disseisor as well to the Infant as to the Lessor of the Plaintiff, who had the moiety as Tenant in common with the Infant, and then when the Lessor of the Plaintiff entered upon the Defendant, and leased to the Plaintiff, and the Defendant entered and ejected the Plaintiff, he is a Disseisor, to which he answered, That the Defendant when he entered by the Lease at Will, he was no Disseisor, for such a Lease of an Infant is not void, but only voidable, &c. and then a sufficient Lease against the Plaintiff, although not against the Infant. Beaumont Serjeant, to the contrary; By this manner of gift, William the Son took nothing, but the estate settled only in William the Father, but not an estate tail, by the words, heredi masculo, &c. And voluntas Donatoris, without sufficient words cannot create an estate tail, but where the intent of the Donor is not according to the Law, The Law shall not be construed according to his intent, but his intent shall be taken according to the Law; And he held that Sir Thomas and William had severall estates in tail, and severall moieties, and not one entire estate, and here, upon all the matter, Sir Thomas is Tenant for life of the whole, the Remainder of one moiety to him in tail, the Remainder of the other moiety unto William in tail, and, rebus sic stantibus, Sir Thomas levying a fine of the whole, now as to one moiety which the Lessor had in tail, the fine is clearly good, and so as to that, Robert the Lessor of the Plaintiff hath a good title, as to the said moiety, and as to the other moiety he conceived also, that William is bound, for this Statute shall not be construed by Equity, but shall binde all who are expressly excepted, and that is not William the Son, for his father never returned, and then his Heire is not releived by the statute; Also William had a Right of Entry at the time of the fine levied, scil. for the forfeiture, and because he hath surceased the time, for the said Right of Entry, he shall not have now five years after the death of Tenant for life, for he is the same person, and the second saying which provides for future Rights, extends to other persons then those who are intended in the first saying, and he who may take advantage of the first saying, cannot be releived by the second saying, for no new title doth accrue to him in the Reversion or Remainder, by the death of Tenant for life, for that title accrued to him by the forfeiture, so as the title which he hath by the death of the Tenant for life, is not the title which first accrued unto him: Also by this Forfeiture, the estate for life is determined as if Tenant for life had been dead, for if Tenant for life maketh a feoffment in fee, the Lessor may have a writ of Entry, ad terminum qui praterijt. Firz. 201. which proves, that by the Forfeiture the estate is determined, and then no new title doth accrue to him in the Remainder, by the death of the Tenant for life, but that only which he had before the alienation, so that his non-claim after the five years shall bind him. Then, when William the Infant having a Right to a moiety, and Robert the Lessor of the Plaintiff a Right to the other moiety, and the Infant leaseth unto the Defendant at Will, who entereth, now is he a Disseisor as well to Robert as to the Infant: Then if the Defendant be Disseisor and hath no title by the Infant, Robert who hath Right in a moiety may well enter into the whole, for he hath the possession

per my & per tout by his Entry, and then when the Defendant hath ejected him, he hath good cause of Action. And after at another day the Case was moved, and it was agreed, That for one moiety the Infant is bound, for Sir Thomas had an estate tail in a moiety, for he was Issue of the body of the Countess, but for the other moiety, the Fine leved by Tenant for life, William the Father being then Tenant beyond the Sea, It was holden by Anderson, Windham, and Walmesley, that the Infant was not barred, notwithstanding the objection abovesaid, That William the Father never returned into England, and notwithstanding the words of the Statute of 4 H. 7. And by Walmesley, If an infant make his claime within age it is sufficient to avoid the Fine, and yet the said Statute seems to appoint to him time within five yeares after his full age. so that according to the very words, a claime made before or after should be vain, yet in Equity, although he be not compellable to make his claime untill the time allowed by the Statute, yet if he make it before, it is good enough. And by Anderson, Although that William the Father did not returne, yet if he makes not his claime within four yeares after the death of his Father being of full age, and without any impediment; &c. he shall be barred, If in such case a man hath many impediments, he is not compellable to make his claim when one of the impediments is removed, but when they are all removed. So if the Ancestor hath one of the said impediments, and dyeth before it be removed, and his Heire is within age, or hath other impediment, he is not bound to make his claime till five yeares after his impediment is removed. And Some case cited before was holden and agreed to be good Law, for the Forfeiture may not be known unto him, And as to the objection against the Lease at Will, because it was made by an Infant, and no Rent reserved upon it, nor the Lease made upon the Land, and therefore the Lessee should be a Disseisor, To that it was answered, Be the Defendant a Disseisor, or not, it is not materiall here, for if the Plaintiff hath not title according to his Declaration, he cannot recover; whether the Defendant hath title or not, for it is not like unto Trespasse where the very without other title is good, contrary in Actions against all who gave not title, but in Ejectione firmæ, if the title of the Plaintiff be not good and sufficient, be the title of the Defendant good or not, he shall not recover: And afterwards Judgment was given for the Defendant; Hill, 33. Eliz.

Mich. 32 & 33 Eliz. In Communi Banco.

CCLXXXVIII. Cheyney and Smiths Case.

In an Ejectione firmæ by Cheyney and his Wife against Smith: The Plaintiffs declared upon a Lease made by the Master of the House of Colledge of S. Thomas of Action in London to IS who assigned it over to Knevir, who by his Will devised the same to his Wife, who he made also his Executrix, and dyed, and afterwards she took to Husband one Waters, and by her Waters took Letters of Administration of the Goods and Chattells of his Wife, and afterwards leased to the Plaintiffs: And upon not guilty they were at Issue. And it was given in Evidence, That the Lease given in Evidence, was not the Lease whereof the Plaintiffs had declared, for the original Lease shewed in Court, is, Master of the House of Hospitall, where the lease specified in the Declaration is, Master of the House of Colledge, 38. E. 3. 28. And some of the Justices conceived that there is not any materiall Variance (but if the parties would, it might be found by speciall Verdict) for by them Colledge and Hospitall are all one: And afterwards the Court moved the Plaintiffs to prove if the wife were in as Executrix, or as Lega-
tee;

tee, for by Anderson, and Periam, untill election be made he shall not be said to have it as Legatee, especially if it be not alleadged in fact, that all the debts of the Testator are paid, and Anderson doubted, although that it be alleadged, that the debts be paid, If the Executors shall be said to have the said Lease, as a Legacy before he hath made Election, vi. Weldens Case, and Paramonts Case in Plowd. And afterwards it was given in Evidence, That the wife after the death of the Husband had repaired the Bankes of the Land, and produced Witnesses to prove it, as if the same should amount to claime it as a Legacy, and the Court said, that that matter should be referred to the Jury: And it was further shewed in Evidence, that the said Wife, Executrix, and her said Husband Waters formerly made a Lease by Deed, reciting thereby, that where the Husband was possessed in the right of his said Wife as Executrix of her first Husband, &c. And by the opinion of the whole Court, the same was an expresse claime as Executrix; and then when the Wife dyed, if the Husband would have advantage of it, he ought to take Letters of Administration of the Goods of her first Husband, and not of the Wife, but if shee had claimed the Land and the Term in it as Legatee, and had not been in possession, Administration taken of the Rights and Debts of the Wife, had been good as to that intent, that his Wife was not actually possessed of it; but only had a Right unto it, and of such things in Action, the Husband might be Executor or Administrator to his Wife, but here they have failed of their title: The Administration being taken of the goods of the Wife, where it should be of the Goods of the Testator the first Husband, And for this cause the Plaintiffs were non-suit, and the Jury discharged. And it was agreed by all the Justices, that if the Wife before Election had taken Husband, that the Husband might have made the Election in the Case aforesaid.

Mich. 32. and 33. Eliz. In Communi Banco.

CCLXXXIX. *The Lord Cobham and Brownes Case.*

The Case between the Lord Cobham and Browne, was, that the Abbot of Grace was seised of the Pannoz of Gravesend in the County of Kent, which Pannoz doth extended to the Parishes of Gravesend, and Milton, and that the said Abbot and all his Predecessors, &c. time out of minde, &c. have had a Water-Court within the said Pannoz, which Court had been holden at Gravesend Bridge in the end of it, and that all the Inhabitants within the said Parishes, which have Boates either entirely or jointly with others, and have used to transport or carry passengers from Gravesend to London, &c. contr. and have used to fasten their Boates at the said Bridge of Gravesend, have used to do suit at the said Court, and there have used to enquire of all misorders, and misdemeanors of Water-men there, and that the said Abbots, &c. have used to have the Fines and Amercements of the same Court, and conveyed the said Pannoz to the Plaintiff, and that at a Court there holden, The Defendant being sworn with the residue of the Enquest to enquire of such disorders, refused to give his Verdict, for which for the said contempt, the Defendant, by the then Steward was amerced twenty shillings, for the which Amercement the Plaintiff brought an Action of Debt: It was moved by Beaumont Serjeant, That the Action did not lye, for the Prescription upon which the Action is grounded is not good, first, he claimes to have this Court within his Pannoz, and as a thing appertaining to it, and yet he claimes suit at his Court of all the Inhabitants of the said two Parishes, and to have them Suitsors at it, being meer Strangers to the Pannoz, and which do not hold of it, for although it be alleadged, that the said Pannoz doth extend

in the said Parishes, yet the same doth not prove that every part of the said Parishes is within the said Mannor, and if it be not so, the Prescription may extend as well to all the County of Kent, as well as to the said two Parishes, for such a Prescription cannot bind but those which are Tenants of the said Mannor, and cannot extend to strangers, which see 21 H. 7. 40. The Case of Poundbreach. Secondly, it is not alleadged here, that the Steward ought and had used to assesse Amercements, for by the common Law no Steward hath authority to assesse Amercements or Fines in a Court Baron, for there the Justices are Judges and not the Steward, and that this Water Court is a Court Baron, it appeareth by the Declaration, for there it is said that it is a Court belonging to such a Mannor, and that prima facie shall be meant a Court Baron, if the contrary be not shewed, vi. Fitz. 75. g. Thirdly, it is not shewed that the Amercement was assessed, which see ib. 75. Harris Serjeant, to the contrary: This Court upon the whole matter is in the nature of a Leet, for the reformation of misorders between the Watermen, and the prescription here will warrant such a Court well enough, And there are many Courts in England which are not Court Barons, but grounded upon Prescription, 40 E. 3. 17. The Court before the Chancellor of Oxford, Prescription to have Swan mote, and it is reason that this Prescription should hold place, for here is quid pro quo, for the Watermen receive their carriage and loading at this Bridge, and also discharge their loading there, and they use to fasten their boates there, and therefore in lieu of that benefit, it is reason that they be attendant at the Court which is upon the said Bridge, and upon that reason is the Prescription of Toll Draverse, 5 H. 7. 9. And to have a Land Bird, 2 R. 3. 15. And toll of every Wessel which passeth the River, 21 H. 7. 16. And this Court may be a Court within the Mannor, and yet no Court Baron, but in the nature of a Leet, and the Prescription shall be good in Law by reason of the recompence to the Justices, and then, if it be not a Court Baron, but rather in the nature of a Leet, then it followes, that the Justices are not Judges but the Steward, and it behoves not to prescribe for the Amercement, for that is incident to a Court Leet, for otherwise how can the Justices be compelled to doe their suit at it, or their defaults, or contempts at the same be punished: and as to the assessing of the Amercement, it needs not here, for it is a fine for the open contempt, and despite done unto the Court, and not an Amercement, and it may well be assessed by the Steward alone, vi. 23 H. 8. Br. Leer, 37. Drill Serjeant, to the contrary: For this Prescription is not reasonable, to drive strangers to doe suit at a Court Baron, for there is sufficient consideration in the Case of Tenants of the Mannor, for it may be at the beginning, the Tenancies were given upon such consideration to doe such suit: But in the principall case, the Prescription is their ground, and therefore unreasonable, because without consideration, 22 E. 4. 43, see the case there, and 21 H. 7. 20. A custome alleadged, that if any Tenant distraine the Beasts of another, Damage Feasant, that he ought to bring such Beasts to the pound of the Lord of the Mannor, and if not, that at the next Court he should be amerced, and be punished, and the same was holden no good custome, because against common Right and common Law: Pockering Serjeant: If this Court shall be reputed in Law a Court Baron, then the Prescription, for the manner of it is not good, for in such case, the Amercement cannot be assessed by the Steward, But he held, that this court is in the nature of a Court Leet, and not a Court Baron, and all Inhabitants within the Precinct of it, are bounden to doe their suit at it by reason of their Restancy, and their trade there, if they have Boates, or Wares in Boates, and such court is for the better government of such Watermen, and the exercise and practise of their trade, and for the redressing of misdemeanors betwixt them, and so this court hath a reasonable commencement, being instituted for the publick good, and if customes which concerne the

private benefit of any be allowable; as the Bayes and Burgeses of a Town prescribe to have of every Tun which cometh in any Ship into their Port, and put upon the Land 6 d. for Toll. See 21 H. 6. A fortiori, a Custom or Prescription which concerns the publick good, is good: & it is not strange that such Court hath been maintained by Prescription, for the Court of Scamper is so without any commencement or erection, but by Custom. And although that of a thing Toll cannot be paid at any Market for things brought to Market, but for things sold, yet by custom, Toll shall be paid for every thing brought to Market, and for the standing of the Seller there, for the sale of Victuals is for the good of the Common-wealth, which thing is the ground of the Prescription in the principall Case, and therefore the Prescription in the manner of it is good: and if the prescription be good for the Court, then to have a Steward to keep the Court, to assess Fines for contempts & disorders is good without any speciall prescription, for it is incident to it. Periam Justice, If it be a Court-baron then cannot the Steward impose or assess any fine: which Windham granted, but he conceived it is not a Court-baron, but a Court by prescription. Periam, If the Plaintiff claim it as belonging to his Manor, it shall be intended a Court-baron, but yet a man may have a Court within his Manor by prescription, which is not a Court-baron. Anderson was of opinion that it is not a Court-baron, for although it be appertaining to the Manor, yet that is not any proof that it is a Court-baron: For a Kest may be appertaining to a Manor. It was adjourned.

Mich. 32 & 33 Eliz. In Communi Banco:

CCC. Green and Edwards Case:

Between Green and Edwards the Case was this, Land is demised to A. for thirtie yeares, if he shall so long live, and if he dye within the Term, that B. his Wife shall have it duranc totu residuo termini predicti. The Husband dyeth during the Term: If the Wife shall have the residue of the Term was the Question. And by Periam and VValmesly Justices, by the death of the Husband the Term is determined, and thereupon nothing can remain, especially by way of grant, but by way of Devise it might be. See 9 Eliz. 253. A Lease for forty yeares to A. if he shall live so long, and if he dye within the Term, that E. his Wife shall have the residue of the yeares: Where it was holden, that by the death of A. the Term is determined, and then there is no residue, and so the Limitation is void, vide 3 & 4 Phil. & Mar. 130. Anderson, If the Husband and Wife had been parties to the Deed of Demise, then the residue of the Term should go to the Wife after the death of the Husband: and this word (Terminum) shall not be taken for the Interest which is given to the Husband, but for the time, so it is as much as to say, that if the Husband dye before the forty yeares expired, that then his Wife shall have the residue for forty yeares; and it is reason to make such construction rather then to construe the said part of the Deed to be void: For if in the construction of this Grant, the Term shall be taken for the Interest, then the Limitation shall be void. And in all Grants, the Deeds shall be taken most benefitally for the Grantor, and most strongly against the Grantor, especially ut res magis valeat quam pereat: And here are severall Grants and severall Termes: But if such matter be limited to the Wife not named in the Deed, all is void, for it is uncertain when the Term shall begin, and it cannot last during the particular Estate, and it is not certain, whether the Husband shall survive the Term, or not: And by VValmesly and Windham the said Limitation is meerly void: As if a Lessee grants all his Term for so many yeares as shall be behind after his death, the same is a void Grant, for the Lessee may over-live all the Term, and then

then it is incertain when it shall begin : And in this Case this word, Term, shall be taken for the Interest, and not for the time, vide 35 H.8. Br. Conditions 203. vide C. 2. part, in the Regoz of Chedingstones Case, this Case vouched.

Mich. 32, & 33 Eliz. In the Common Bench.

CCCI. Gawton and the Lord Dacres Case:

IF Debt upon Surplussage of an Accompt by Gawton, against George Lord Dacres ; It was said by Periam Justice, and not denied by any, that if I make J.S. my Auditor, generally to take Accompts of all my Bayliffs and Receivers, that he is not a sufficient Auditor without a Patent ; for when a man is made an Auditor generally, he is an Officer, and an Officer cannot be without a Deed. But if a Bayliff, or Receiver be accountable to me, it is as clear on the other side, that I may appoint one to be my Auditor to take the accompt of him, pro hac vice by word ; which Anderson granted : But if he afterwards takes an accompt of any by force or colour of the said Warrant without my Commandment, he is not a sufficient Auditor to such intent, either to take the accompt, or to assess the arrearages if the accomptant be found in arrear, or to make allowance if he be found in Surplussage : And by him, If one become my Bayliff of his own wrong, without my appointment, he is accountable to me, but I am not compellable to make him any allowance for his Expences about my business. And if I assigne to such Bayliff of his own wrong an Auditor, he cannot make allowances of such Expences. Anderson, If my Auditor make allowance to my Bayliff for any collateral Expences, which he hath expended in my affaires, which do not concern my Pannoz, whereof he is Bayliff, such allowance shall not bind me. And note, that in this Action the Plaintiff declared that he was Bayliff to the Defendant of certain Pannozs, Receiver of certain monies, and so retained, ad diversa negotia procurandam : And upon accompt the allowance was made unto him for his Board-wages, and other Expences in riding Circa negotia. And by Anderson, these allowances shall not bind the Defendant ; for as Bayliff of a Pannoz, no Expences shall be allowed unto him, but those which the Bayliff hath expended within the Pannoz : And if I retain one to go about my business, he is not accountable. Windham, If I retain one to follow my business, and deliver to him money to disburse in such business, he is accountable. Anderson, It is so truly, but it is not in respect of the said Retainer, but as he was Receiver, and if he expend more then he hath received, he doth it without Warrant and no allowance shall be made unto him. If the Bayliff be found in Surplussage in the conclusion of the accompt, the Auditor ought to enter. Allocator super determinationem Compt. in surplussagiis, so much for such and such Expences, allocatis allocandis upon the next accompt : But in this Case it appeared upon the Evidence, that the Entry upon the foot of the accompt was, And so he is in Surplussage upon the determination of this accompt twenty six pounds : But the Auditor being examined, said, that it was not his meaning to allow unto him so much, but onely to find and expresse the certainty of the whole accompt, and so refer the allowance of it to the Defendant to whom he was Auditor : and upon that the Court said so to the Jury, if they beleived the Auditor, that they should find against the Plaintiff, for upon the matter here is not any accompt, and so no allowance for the allowance if it had been according to Law ought to be entred, before Allocator, &c. and such allowance is as a Judgment, but here is not any allowance, for the Auditor did refer the same to the Defendant : But if the Jury doth not give credite to the Auditor, then the Court moved the Jury to find

it specially that the party was Auditor without Deed, and the finding of the account as it is set down in the Declaration, and the manner of the conclusion of it. viz. That the Plaintiff was in Surplusage upon the determination of the account for his Expences in riding Circa negotia defendendentis, and for his Board-wages twenty six pounes.

Mich. 32, & 33 Eliz. in the Common Bench.

CCCII. Chamberlayns Case.

Cattell taken
in Withernam,
worked.

In this Case it was moved, whether Beasts taken in Withernam, might be used and worked by the partie as his proper Beasts: And it was said by the Court, that Beasts distrained, as Cotes, could not be milked, nor Horses wrought, but they ought to be put in the Pound open, and there the Owner might milk them and fodder them. But if Cotes be taken in Withernam, because they are delivered to the party in lieu of his own Cattell, he may milk them, or if they be Dren, or Horses reasonably work them, otherwise he should be at great charges of keeping and pasturing of them, and no profit, or consideration for it. And so, It should be a great inconvenience to the Common-wealth: For if the Cotes are not milked, the milk is lost, and also the Cotes impaired thereby.

Mich. 32, & 33 Eliz. in the Common Bench.

CCCIII. Byne and Playnes Case.

Assumpsit.

In an action upon the case by Byne against Playne, the Plaintiff declared, that whereas he himself had recovered against Thomas Ward in the Court of the Queen in Southwark, holden before Onesley Steward there for the Mayor of London, the sum of twenty pounds, and had obtained out of the said Court a Laveri facias directed to the Bayliff to do execution upon the Goods of the said Thomas Ward, which then were in the possession of the said Plaintiff, and where the said Bayliff by vertue of the said Writ it was ready to have done execution of the said Goods; the Defendant came to the now Plaintiff, and assumed to him, that in consideration that the said Plaintiff would deliver to the Defendant the said Goods, that he would in fourteen daies after Michaelmas next pay to the Plaintiff twenty pounds, or otherwise deliver to him the said Goods again, if in the mean time no other makes Title unto them, and prove them to be his own Goods. And further, that the Plaintiff shall have free ingresse and regresse to a Chamber in the house of the Defendant in the mean time. And upon Non-assumpsit pleaded, it was found by the Jury, that such a Recovery was in the said Court, and that the Defendant did assume, &c. But they further say, that before the said Recovery, the said Thomas Ward was possessed of the said Goods as of his own proper goods: And, by Deed invented, sold them to his Brother R. Ward, in consideration of a certain sum of money, with a Proviso, that the said Thomas Ward, notwithstanding the said sale should have the possession of them for four years, which are not yet expired, paying to the said R. Ward twenty shillings by the year, and if, at the end of the said four yeares, the said Thomas did repay the said sum of money to the said R. Ward, that then the said sale should be void. And they further say, that the said Robert Ward made Title to the said goods by vertue of the said sale. Exception was taken to the Declaration, because it was not shewed by what authority or Title the Court was holden; Also it sheweth, that the Bayliff was ready to do Execution upon the said Goods, but

but doth not shew where the said goods then were, but the exceptions were not allowed, for these matters are but inducement and conveynance to the action, and not the matter, or substance of it : Another exception was taken, because the request is not sufficiently alleadged : Licet scipius requisitas, but that exception was not allowed, for here the Assumpsit is to pay at a certaine day, and then the request is not materiall, but where a Request is parcell of the Assumpsit, there an expresse Request ought to be taxed, as if the payment should be upon Request. As to the matter in Law, here is not any consideration, for the goods were not subject to execution, for Thomas Ward had but a speciall property in them, but the generall property was in R. Ward, and so no cause to deliver them back to the Plaintiff, and here by the Verdict the surreain title is proved, for proof ought to be by Verdict, which see Perk. 154. a. & 7. R. 2. c. Bar 241. For it appeareth, before the said Recovery, Thomas sold the goods with promise, ut supra. Owen, Although it be found that R. Ward had the generall property, yet Thomas had the speciall and present property, and that against R. Ward himselfe, so that during the said foure yeares R. Ward could not entermeeble with the goods, and though that no execution can be had against him who hath such a speciall property, yet that is not the case here, for here one who hath the possession of certain goods, delivers them to another, and in consideration thereof, he to whom the delivery is made, promisseth to re-deliver them unto the Bayler, or to pay so much money, this is a good consideration, when a lawfull property or title he hath who makes the Delivery. And of that opinion were all the Justices, for it appeareth, that the Plaintiff had a possession of the said goods, and that the said Thomas Ward had a speciall property, and because of such possession was chargeable to an action of the said Thomas Ward, be it that the Plaintiff comes to the said goods by Bayment or Trover, for by Periam, if goods come to another by Trover, and he delivereth them over, he is answerable to him who hath right unto them : The Delivery of these goods to the Defendant, is a good consideration, and the Defendant hath benefit by the use of them, and the property of the goods is not to be argued in this case, but the Delivery to the Defendant is the only matter : And because the Delivery of the goods to the Defendant, and the Assumpsit upon it, it was holden, although the goods were not liable to execution, yet the Assumpsit was good, and afterwards Judgment was given for the Plaintiff.

Mich. 32 & 33 Eliz. In Communi Banco.

CCCIV. Vandrink and Archers Case.

VAndrink brought an action upon the case against Archer, and declared, that whereas he himselfe was possessed of twenty seven Ells of Linnen cloth, as of his own goods, the same came to the hands of the Defendant by Trover, and he knowing the said goods to be the goods of the Plaintiff, sold them unto persons unknown, and the money thereof proceeding did convert to his own use : The Defendant pleaded, that as to twenty foure Ells of the said Linnen cloth, long time before the losing, one Copland was possessed thereof, ut de bonis suis proprijs, and sold them to the Defendant, who before any notice that they were the goods of the Plaintiff, and before any request, sold them to persons unknown : And as to the other three Ells, he was always ready to deliver them to the Plaintiff, and yet is, and upon these Pleas, the Plaintiff did demur in Law. Owen Serjeant, for the Plaintiff, That both Pleas are insufficient, the first Plea is not an answer but by argument, for the Plaintiff declares of a commission of his own goods, and the Defendant answers to a commission of his own goods, 33 H. 8. Br. Action for

Trover and
conversion.

sur le case, 109. In an action upon the case the Plaintiff declares, that the Defendant found the goods of the Plaintiff, and delivered them to persons unknown. Non deliberavit modo & forma, is no Plea, but he ought to plead not guilty, and in an action upon the case, the Plaintiff declared, that he was possessed of certaine goods, ut de bonis suis proprijs, and the Defendant found them, and converted them to his own use; It is no Plea for the Defendant to say, that the Plaintiff was not possessed of the said goods as of his proper goods, but he ought to plead not guilty to the mis-demeanor, and give in Evidence, that they were not the goods of the Plaintiff, and 4 E. 6. Br. action upon the case 113. The Plaintiff declared that he was possessed of certain goods as of his proper goods, and lost them; and the Defendant found them and converted them to his own use, the Defendant pleaded, that the Plaintiff pawned the said goods to the Defendant for ten pounds, for which he detained them according to the said pawne, and traversed the conversion, and by some it was holden, that he ought to plead not guilty, and give the especiall matter aforesaid in Evidence; and 2. & 3. Phil. and Ma. Dyer 121. The case of the Lord Mounteagle, in an action upon the Case, the Plaintiff declared, upon a Trover of a chayne of Gold, and that the Defendant had sold it to persons unknown, the Defendant pleaded, That ipse non vendidit modo & forma, and upon that the Plaintiff did demur in Law, and see 27 H. 8. 13. Where goods come to one by Trover, he shall not be charged to an action, but for the time he hath the possession; But that is to be intended in an Action of Detinue, and not in an action upon the Case, for such action upon the Case is not grounded upon the Trover, but upon the mis-demeanor, that is, the Conversion. And as to the other Plea it is utterly insufficient, for the Plaintiff declares of a Conversion, and he pleads a possession, that he is alwayes ready, and so doth not answer to the point of the action. Yelverton Serjeant, to the contrary, and he conceived for the first Plea, that it is a direct answer, for he hath justified his sale to persons unknown, for that he hath bought the goods of one Copland whose goods they were, and because the Plaintiff hath demurred upon the Plea, he hath confessed the truth of the matter contained in it, scil. that the property of the goods was to Copland; and so in the Defendant by the said sale, and then he hath good cause to convert them to his own use by sale or otherwise; And he conceived, that there is a difference, 27 H. 8. 13. betwixt Bayment, and Trover, for in case of Trover, the party is not chargeable but in respect of the possession, which being removed, the action is gone against the finder, for he who findeth goods is not bound to keep them, nor to give an account for them. And he put the case reported by Dyer, 13. & 14. Eliz. 306, 307. R. Fines brought an action upon the case, and declared, he was possessed of a Hawke, as of his proper goods at W. and casually lost it at B, and that it afterwards casually came to the hands of the Defendant by Trover, and that he knowing it to be the Plaintiffs Hawke, sold the same for money to persons unknown; The Defendant pleaded that the Hawke first after the losing of it came to the hands of one Feoffryes, who sold it to one Rowly who gave it to the Defendant at A, who sold it to Poulton, and the same was found a sufficient Bar, and it is hard where goods, as Wren or Horses come to another by Trover, that he should be charged to keep them and pasture them untill the Owner claimeth them, and therefore it is not reason but that he discharge himselfe by the quitting of the possession of them. And as to the other Plea, the matter of the Plea is good enough, and the defect is but in the forme, which because the Plaintiff upon his Demurrer hath not shewed to the Court according to the Statute, he shall not take advantage of it, but the matter of the Plea is sufficient, scil. the finding, and the offer to deliver it to the Plaintiff. Anderson Justice, For the examination of the insufficiency of this Plea, the nature of the action, and the cause of it, is to be considered; the nature of the action, it is an action upon

upon the case, the cause, the Trover, and conversion; Then for the latter plea his readiness, to deliver it. It cannot be any answer to the Declaration of the Plaintiff: For this action is not Debt or Detinue, where the thing it selfe is to be delivered, for in such case, the Plea had been good, but the Conversion is the speciall cause of this Action, which by this Plea is not answered, and for the other Plea, the Declaration is not answered by it. But here is some matter of justification, for when a man comes to goods by Trover, there is not any doubt but by the Law he hath liberty to take the possession of them, but he cannot abuse them, kill them, or convert them to his own use, or make any profit of them, and if he doe, it is great reason that he be answerable for the same, but if he lose such goods afterwards, or they be taken from him, then he shall not be charged, for he is not bound to keep them, and so he conceived Judgment ought to be for the Plaintiff. Windham Justice, neither Plea is good, as to the first Plea, he confesseth the conversion, but hath not conveyed unto himselfe a sufficient title to the goods by which he might justify the Conversion, for the Plaintiff declares of a conversion of his own goods, and the Defendant justifies, because the property of the goods was in a stranger who sold them to him, which cannot be any good title for him without a Traverse, unless he had shewed, that he bought them in an open Market, and then upon such matter he might well have justified the Conversion, and as to the other Plea, the same is naught also, for the goods are not in demand, and then the said Plea is not proper to say, that he is ready to deliver them, for damages only for the conversion are in demand, and not the goods themselves, and therefore the same is a Plea but by Argument, scil. He is ready to deliver. Ergo, he hath not converted, and yet the same is not a good argument, for if a man find my Horse, and rides upon him, or hereby he becomes lame, or otherwise by excessive travell mis-useth him, so as my Horse is the worse thereby: He may be ready to deliver me my Horse, and yet this action will lye, for such an abusing of the Horse is a Conversion to his own use: Periam Justice; The latter Plea clearly is insufficient, for it amounteth but to Not guilty, but for the first Plea, he doubted of it, for first the property is not traversable, nor the knowing, but upon the generall Issue pleaded, such matter may be given in Evidence, and he conceived, That where a man buyes goods of one who comes to them by Trover, that he may sell them, and shall not be answerable for them, And although it may be said, that the said matter may be given in Evidence, yet it is not good to put the same to the people, but to refer the matter to the Judgment of the Court: Walm. Justice. The latter Plea is clearly insufficient, but for the first he doubted of it, for he conceived, that the sale of the goods is not a Conversion: Anderson, The first Plea is, ut supra, and nothing in that is materiall or traversable, for all the Plea may be true, and yet the Defendant is guilty, for it may be that the Defendant himselfe sold them to the Plaintiff, or to another who sold them to the Plaintiff, and that afterwards the Defendant found them, and here the Conversion is confessed, and not so voided by sufficient justification, and by him, the sale to persons unknown is no good Plea, for his sale is his own Act, and it cannot be but he must have notice of the buyers, and therefore he ought in his Plea to shew their names: Periam, Contrary to that matter as to the naming of the buyers, for it should be an infinite thing for a Draper to take notice of every one who buyeth an Ell of Cloath of him: And afterwards the same Terme Judgment was given for the Plaintiff upon the insufficiency of the Plea.

Mich. 32. & 33 Eliz. in the Common Bench.

CCC.V. Walgrave against Ogden.

Trover and
Conversion.

An action upon the case was brought upon a Trover and conversion of twenty barrels of Butter, and declared, that by negligent keeping of them, they were become of little value, upon which there was a Demurrer in Law: And by the opinion of the whole Court upon this matter, no action lieth; For a man who comes to Goods by Trover, is not bound to keep them so safely, as he who comes to them by Bayment. Walmesley, If a man find my Garments, and suffereth them to be eaten with Wormes by the negligent keeping of them, No Action lieth: but if he weareth my Garments, it is otherwise, for the wearing is a Conversion.

Mich. 32. & 33. Eliz. in the Common Bench.

CCCVI. Alexander and the Lady Greshams Case.

Debt for arre-
rages of annui-
ty

ALice Alexander, Administratrix to her late Husband, brought an Action of Debt for the arrearages of an Annuity, against the Lady Gresham, Executrix of Sir Thomas Gresham her late Husband, incurred in the life-time of her late Husband Sir Thomas Gresham: The Defendant pleaded, that she had fully administered; the Plaintiff replied, Assets, scil. That the Defendant had divers Goods in her hands not administered, which were the goods of the said Sir Thomas at the time of his death, upon which they were at Issue. And it was found by speciall Verdict, that Sir Thomas Gresham being seised of divers Mannors and other Lands in Fee, devised them by his last Will to his Wife the Defendant, to use at her own pleasure: And by his said Will requested his Wife to pay his Debts and Legacies: and further it was found, that at the Parliament holden 22 Eliz. a private Act was made, by which it was enacted, that the said Lady should take upon her the charge of all her Husbands Debts, and for the discharge thereof, she shall sell so much Land as will yeild so much money as will serve for the payment of the said Debts, and if she shall faile therein, that then certain Commissioners shall be appointed for the sale of so much Land, &c. and for all such Debts as the said Lady should not acknowledge to be good and true Debts, that then the Creditors to whom they were due, should repaire to the said Commissioners, and they should determine both of the certainty of the summe of the due Debts, and of the Damages for the forbearing thereof: and that afterwards the said Creditors should have their remedy against the said Lady for such summe of money so agreed upon by the said Commissioners: and found the Statute at large, and that the said Lady Gresham had sold certain Lands parcell of the Possessions of the said Sir Thomas, by which sale she had received the summe of twenty thousand pounds, which yet is unadministred for the greatest part of it. And if upon the whole matter the said summe of twenty thousand pounds be Assets, then they And for the Plaintiff, but if not, then for the Defendant. And it was moved by Hammon Serjeant, that here is Assets upon this matter, and that by the Common Law, for it appeareth upon the Will, that the Lands were devised to the Lady, to the intent that she should pay his Debts. And although the words of the Charge are, that the Testator requests the Lady to pay his Debts, the same in a Will doth amount to a Condition, and so the meaning of the Devisor appeareth to be, that the money

Devised.

ney which is levied by such sale shall be Assets, &c. 2 H. 4. 21, 22. A man Assets.
makes a Feoffment in Fee to divers persons, upon condition that they sell
the Land, and the money thereof coming distribute for his Soul. The Feof-
fodrieth, the Feoffees (who were also Executors of the Feoffor) sell the
Lands, the money thereof coming is adjudged Assets. And see, 3 H. 6. 3. And
although it be not Assets by the Common Law, yet it is Assets by the speci-
all Statute; which ordaines, that the shall be charged with the Debts, and
that the Lands shall be sold. And it was found by the Verdict that such Lands
were sold, and such money levied upon the sale, which are administered.
And although the said twenty thousand pennes were never the Goods of the
Testator, yet as the Case is, 3 H. 6. 3. If Executors recover Damages in
trespasse of Goods taken away in the life of the Testator, such Damages so
recovered are Assets. So if Executors redeem a Pledge with their own pro-
per Goods, the same is Assets in their hands, by Kingmill, Vavafour, and
Fiber, 20 H. 7. 42. And where the Executors took of one who was indebted to
their Testator in a simple Contract, the same is Assets, 31 E. 3. And see many
Cases of such speciall Assets, 7 Eliz. in Plowdens Comment. in Chapman and
Daltons case, 262. It hath been objected, that the speciall Assets enacted by
Parliament, do not maintain the generall Assets intended in the Issue, but
be conceived, the same is well enough. As 27 H. 8. 21. In an Action upon the
Statute of 21 H. 8. for that the Defendant hath occupied Land to farm against
the Statute. The Defendant pleaded, Non tenuit ad firmam contra formam
Statuti: And gave in Evidence, that he had taken to Farm for the mainte-
nance of his house, the same is a good Evidence, and shall maintain the Is-
sue, for he did not occupy against the form of the Statute: for there is a clause
in the Statute to that purpose. Puckering Serjeant to the contrary, That it
cannot be said Assets by the Statute, and that the Plaintiff upon this generall
Issue shall not take advantage of the speciall Assets enacted by Parliament:
And here the Plaintiff hath not pursued the Statute, for in case the Defen-
dant will not confesse the Debt, by the Statute the Commissioners ought to
determine of it, and asseſſe Damages for the forbearing, and then the party
is to have her remedy for all as shall be so determined by the Commissioners
by action of Debt: and because the Plaintiff hath not followed the said Sta-
tute, those twenty thousand pounds shall not be Assets as to her, for they are
not agreed of the Debt, nor of the Damages for it, but the Commissioners
are to appoint sale of the Lands, so as the money arising of the sale of any
Lands, shall not be Assets but of such Lands which have been appointed to be
sold by the order of the Commissioners. And as to the Common Law, the
same is not Assets, but where Lands devised to be sold by the Executors for
the payment of Debts and Legacies, in such case the money arising of such
sale is Assets. And see 9 Eliz. 264. Dyer, A man devised his Lands to be sold
by his Executors, and that the money thereof coming shall be disposed in pay-
ment of Legacies expressed in his Will, the Land is sold; by Catlin, Dyer and
Sanders, the money thereof coming is Assets: but 4, & 5 Phil. & Mar. Dyer
152. the Law was otherwise taken. Where a man devised that his Execu-
tors should sell his Land, and that his Daughters should have such portions
out of the monies thereof coming, the Land is sold accordingly, the Daugh-
ters sued the Executors in the Spirituall Court. In that Case a Prohibition
lyeth, for it is not a Legacy Testamentary, but out of the Land, &c. And
also in the principal case, the Lands are not devised to be sold, but there is
only a Request to his Wife, that she would pay his Debts, without any
condition, or expresse direction, or limitation, 30 H. 8. Land devised to Ex-
ecutors to sell, and the money thereof coming to be divided between his chil-
dren: the money shall not be Assets, and if it be not Assets by the common
Law, but speciall Assets by a speciall Law, the Plaintiff ought to have shew-
ed the same in his Declaration, and then to have maintained against the De-

pendant the said speciall Assets upon the Statute: As if in Debt upon an Obligation, the Defendant will plead, Non est factum, and give in Evidence the Statute of 23 H. 6. the same shall not maintain his Plea of Non est factum, but he ought to have pleaded the speciall matter in Bar. And see 4 H. 7. 8. So the Plaintiff here ought to have in her Replication shewed the especiall matter upon the Statute. Anderson and Walmesly conceived, that the same is Assets within the Issue, and that the Defendant is chargable as Executrix, otherwise there is no remedy, and the Ad confirms her to be Executrix, and expaines, that she shall take upon her the charge of payment of Debts, and that the Goods and all the monies which come by sale of the Lands and Woods shall be Assets. And because that by the said Ad the money coming by sale of Woods and Lands are joyned together with the Goods of the Testator in the same plight, all are in the same degree, and both equally Assets. Periam did not speak to that, but Windham held, That these Assets found by the Verdict, are not Assets intended in the Will, and that the Plaintiff hath not pursued the Statute, which makes such matter Assets. It was adjourned.

Pasch: 33 Eliz: in the Common Pleas.

CCCVII. *The Queen and the Bishop of Yorks Case.*

Quare Impedit.

Collation
gaines not the
Patronage of
the King.

The Queen brought a Quare Impedit against the Bishop of York, and one Monck; and counted upon a Presentment made by him, Hen. 8. in the right of his Dutchy of Lancaster, and so conveyed the same to the Queen by discent: The Bishop pleaded, that he and his Predecessors have collated to the said Church, &c. and Monck pleaded the same plea, upon which there was a Demurrer. And it was moved by Beaumont Serjeant, That the plea is not good, for a Collation cannot gain any Patronage, and cannot be an Usurpation against a common person, much lesse against the Queen, to whom no Lapses shall be ascribed: and although the Queen is seised of this Abbotsion in the right of her Dutchy, yet when the Church becomes void, the Right to present vests in the royall person of the Queen: and yet see the old Register 31. Quando Rex presentat non in jure Coronæ tunc incurrit ei tempus. Hammon Serjeant, By these Collations the Queen shall be put out of possession, and put to her Writ of Right of Abbotsion; but the same ought to be intended not where the Bishop Collates as Ordinary, but where he collates as Patron, claiming the Patronage to himself, for such a Collation doth amount to a Presentation; and here are two or three Collations pleaded, which should put the Queen out of possession, although she shall not be bound by the first during the life of the first Incumbent. vide Br. Quare Impedit 31: upon the abridging of the case of 47 E. 3. 4. That two Presentments the one after the other shall put the King out of possession, and put him to his Writ of Right of Abbotsion, which Anderson denies. And it was holden by the whole Court, Here is not any Presentation, and then no possession gained by the Collations: and although the Bishop doth collate as Patron, and not as Ordinary, yet it is but a Collation. And there is a great difference betwixt Collation and Presentation, for Collation is a giving of the Church to the Parson, and Presentation is a giving and offering of the Parson to the Church, and that makes a Plenarty, but not a collation. And although that the Queen hath the abbotsion, by the right of her Dutchy, yet that makes not any matter, for the person of the Queen priviledgeth all her Capacities: and therefore Plenarty is no plea against the Queen, be she seised of the Abbotsion in the Right of her Crown, or of her Dutchy; but when she claimes by Lapses, it is otherwise. And afterwards Exception was

Plenarty no
plea against
the King.

was taken to the Writ, because it is not set forth in the Writ how the Queen claimed the Abbotsdon; as where the King had Right to present by reason of the Temporalities of the Bishop in his hands, the Writ shall say, *Ratione Archiepiscopatus Cant. nunc Vacant.* or *Ratione Custodie*: And so because this Abbotsdon is parcell of her Duchy, the Writ ought to say so: And Anderson chief Justice was of opinion, that the Writ was good enough, notwithstanding the want of that clause, *Ratione Ducatus*, for both waies it is good and sufficient, generally, or specially; as where a man hath an Abbotsdon in the Right of his Wife, and the Husband brings a *Quare Impedit*, the Writ shall be generally, ad suam special. Donationem, without the mentioning of his Wife. See the Book of Entries 483. the Writ is generally, but the Count is special. And there is the very case of the Duchy of Lancaster, and then the Writ is generally, but the Count is *ratione Ducatus sui Lancast.* And such an avoidance of a Church, parcell of the Duchy, may be granted under the Great Seale: And see the case of the Duchy of Lancaster in Plowden to that purpose, and afterwards a President was shewed, in An. 32 H. 6. Where the Writ was generally, and the Count was *Ratione Ducatus*.

CCCVIII. Pasch. 33 Eliz. in the Common Pleas.

A Span made a Lease for years to begin at the Feast of our Lady Mary, for one and twenty yeares, without shewing the certainty at which feasts the Annunciation, Purification, &c. yet the Lease is good enough, and the Lessee may determine the certainty of the beginning of the Term by his Entry, at which of the said feasts the said Term shall begin, by Anderson chief Justice, but Periam doubted of it. Leases.

Pasch. 33 Eliz. in the Common Pleas.

CCCIX. Blagrove and Woods Case.

In an action of Trespasse brought by Blagrove against Wood, of Lands in Tooting in the County of Surrey, concerning a Surrender made to the use of Sir Thomas Holcroft, by Alice Pagnam, 7 E. 6. before one Forcet then Steward there: The Issue was, If at the time of the said surrender, the said Forcet was Steward of the said Mannor. And the Jury found a special Verdict, scilicet. That the said Forcet circa 9 Aprilis, 7 E. 6. was retained by one Elizabeth Pagnam, then, before and afterwards Lady of the said Mannor, to be her Steward there for the keeping of the Courts of the said Mannor, and this Retainer was onely by Word in the Countrey, and no Fee or Annuity given for the exercise of the said Office: and that the said Forcet, according to the said Retainer, had kept Courts there divers times. And further, that such a day and yeare at St. Dunstons in the East, the said Forcet took a Surrender, which was entered in the Rolls the next Court: and that before that and after, he took divers Surrenders as well out of Court, as in Court, and had holden divers Courts there. And upon this Verdict, it was moved by Snagg Serjeant, That Forcet upon the matter found by the Verdict, is not such a Steward, that may take Surrenders out of Court, being retained only by word, although to do other Acts in Court he be a sufficient Steward, for in the Court he is as a Judge, and no body is to dispute his Authority there. And there is a great difference betwixt a Steward of a Mannor, and a Steward of Courts; and a Steward of one Mannor hath not as great an authority as the Steward of another Mannor, for a Steward of a Mannor may take Surrenders in any place, otherwise it is where a Steward is retained to keep Courts;

Vide C. 4. part.
30 Dame Hol-
mofis case.

Courts, for he hath no authority but to keep Court, and all his power is with-
in the Court, and not without. See 8 Eliz. Dyer 248. Drow Serjeant to the
contrary. Here Forcet upon this Retainer was Steward at the Will of
the Lady of the Mannor, which Will shall not be said to be determined, untill
the Lady doth discharge him: and the difference which hath been taken be-
tween Steward of Courts, and Steward of a Mannor is nothing to the pur-
pose, for there is not any reason in it: and it is true, an Aile cannot be
brought of such an Office, without a Patent of it, for it cannot passe for life
without a Deed, and although a Steward in the Courts of Copholders be
a Judge, yet he may be appointed without Deed: as where two submit them-
selves to the arbitration of others, now the Arbitrators are Judges as to that
intent, and yet they may be appointed Arbitrators, and discharged without
Deed, 19 H. 6. 6. 5 E. 4. 3. 21 H. 6. 30. but they cannot by their award trans-
fer Freehold from one to another, 21 E. 3. 26. 14 H. 4. 18. and 17. by Calpe-
per and Skreen; and see as to a Steward retained by moyn, 8 Eliz. 248, and
see 12 H. 7. 25, 26, 27. where a Bayliff of a Mannor may be appointed without
Deed, so of an under-Sheriff, and yet he is a Judge. Owen Serjeant con-
trary, Here Forcet at the time of this Surrender was not Steward, but the
Retainer void. 1. No Fee is allowed unto him for the exercise of the said
Office, 3 H. 6. A Labourer may be retained without promise of any Sal-
lary in certain, for it is appointed by the Law. 2. He is not retained by
Deed, and although he may be retained without Deed to hold Court, proho-
vice, yet if the Retainer be for life, or for yeares, it ought to be by Deed. 3.
He was retained to keep the Court, but not to be Steward, which shall be in-
tended to hold Court, and then when that is past, his authority shall cease, and
then all which he doth afterwards is void. But if he had been retained to be
Steward of the Mannor, then the Surrender taken out of Court had been
well enough. 4. There is not any custome found by the Verdict, to warrant
such a Surrender taken out of Court, and then if the Surrender be not war-
ranted by their custome it is voyd. Yelverton to the contrary, In all cases
and reall actions which concern Lands, the Suitors are the Judges, but in
personall actions under the sum of forty shillings the Steward is Judge:
and although he be a Judge, yet he may be appointed without Deed. And
whereas it hath been objected, that no Fee is appointed for the exercising of
the Office, the same is not materiall as to the Grant, but the party is not
compellable without a Fee to do the Service: and a man may be constitu-
ted Bayliff of such a Mannor without Deed, and yet moze doth appertain
to the Office of the Bayliff, then to the Steward: as if the Lord of a Man-
nor be beyond the Sea, the Writ of Right shall be directed to the Bayliff
of the Mannor: and see 21 H. 7. 36, 37. Where the Sheriff, or Steward of a
Mannor may be without Deed: and here in the principall case, the Retai-
ner is not to keep one Court, but to keep the Courts of the Lady of the
Mannor, scil. all her Courts, untill he be discharged. It was adjourned.

Pasc. 33. Eliz. In the common Pleas.

CCCX. Ascew and Fuliambs Case.

Audita Quere-
la.

Ascew was bounden by Statute to Fuliambs, and there was not two Seals
put to the Statute, and Execution was sued upon the said Statute, the
Conuict brought an Audita Querela, and they were at Issue, if two Seals
were to the said Statute, and tryed for the Plaintiff in an Audita Querela by
the Sheriff of the city of Lincoln: And it was moved by Glanvill Serjeant,
That the Issue ought to have been tryed by the certificate of the Mayor of Lin-
colne

colne, before whom the acknowledgment was, and not by Jure, which was denied, for the Issue is not whether any such Statute was acknowledged or not, but whether the Statute in question hath two Seals or not, and that is not recozded by the Papoz, as the Statute it selfe is: Another Exception was taken, It appeareth by the Margent of the Record, that the Issue was tryed by the County of Lincolne, where it ought to be tryed by the County of the City of Lincolne, for Lincolne only is in the Margent, But to that it was said, that such is the usuall forme, to which the Preignothozies agreed, and the Book of 18 E. 3. 25. was urged, where execution of Lands of the Conusoz was awarded upon a Statute Merchant, and the Statute was to pay, &c. 16 E. 3. But the Originall Writ which issued to take the body of the Conusoz was 14 E. 3. And upon that Error brought: And the Court awarded that case, but these two cases do differ, for there the Proccesse was mis-awarded, not so here: And although a Writ of Error may lye, yet the same doth not prove, but that an Audita Querela may lye also: And afterwards Judgement was given for the Plaintiff.

Rasch. 31. *Eliz.* In the Common Pleas.

CCCXI. Jennings and Gowers Case.

In the Case betwixt Jennings and Gower, the words were; That if the wife of the Debitor would permit one Wats to enjoy such a Terme for the Term of three years next following, that then she should have all the residue of his Goods and Chattells as his sole Executrix, &c. Anderson cheise Justice conceives, That she should not be Executrix, for she is to be Executrix, upon a condition precedent to be performed before that she be Executrix: And the condition is impossible to be performed, and then she shall never be Executrix, for where an estate is to be created upon a condition impossible to be performed, there the estate shall never come in esse, and here the condition is impossible, for how can she suffer Wats to enjoy the Terme for three years, next following, & the 3. years ought to be past before she hath any power, either to permit or resist, for until the three years be incurred, she cannot be Executrix, nor before the three years expired can she bring any action as Executrix, for her authority doth not begin before the three years be expired. Walm. Peri. & Wind. contrary; Although a grant upon a condition precedent doth not take effect untill the condition be performed, yet such a construction ought not to be used in this case, so the intent of the Debitor in this case shall stand: If the condition had been, that if the wife will finde meat and drink to such a person untill his death, That then she shall be Executrix, shall not the Wife be Executrix till after the death of such party: truly yes, for otherwise she should never be Executrix, which is utterly against the meaning of the Testator, for it was not his intent that the Ordinary should commit Administration of his goods in the mean time: And afterwards Anderson changed his opinion, and agreed with the other Justices: Periam, The subsequent words prove directly, that the meaning of the Testator was, to make his Wife Executrix immediatly, untill she were disturbed by the said Wats, for the words are, that if he refuse to suffer the said Wats to enjoy &c. Then his Son shall be his Executor, which words imply, that by a disturbance made by the Wife her Executorship should cease, and that the Son should have it, which cannot properly be if she was not Executrix from the beginning. And it is the usuall course in the construction of Wills, to consider all the clauses of the Will, and to adjudge upon all the words of the Will, and not upon one part only, and such construction the Judges used in the cases of Param. and Yardley, and Welden, and Elbing. And afterwards at another

another day Judgment was given for the Wife; That shee was Executrix presently, and her authority should not expect untill the three years were expired, if not that any actual disturbance can be proved to be or have been made by the Wife against the Will of the Devisor, and the words of the Will, will receive such construction, that shee shall be Executrix untill an actual disturbance of Wats.

Pasch. 33. Eliz. in the Common Pleas.

CCCXII. Palmes and the Bishop of Peterboroughs Case.

Quare Impedit.

Refusal of the Bishop.

In a Quare Impedit by Margaret Palmes against the Bishop of Peterborough, who pleaded, That the Plaintiff did present unto him one I S, of whom the Bishop asked if he were within Orders; & if he had his Letters of orders, & because the Presentee could not shew the Bishop his Orders, he refused him: And commanded him to come another time and shew to him his Orders, and that the Presentee did never do it, nor offered to the said Bishop his said Orders, without that he did disturb him in other manner. And by Periam and Anderson it is no Plea, for upon his own shewing the Defendant is a disturber: For although that the Statute of 13 Eliz. requires that no man shall be admitted to a Benefice with cure of souls, if he be not a Deacon, yet the Statute doth not extend, to compell the Clark to shew his Orders, and therefore when he for such a frivolous cause doth refuse to admit him, the same is a disturbance; And afterwards exception was taken to the Count, because that the Plaintiff being Tenant for life of the Advowson of the gift of her Husband, had not alleaged any Presentment in her Husband, or any of his Ancestors, but only in her selfe, But that was not allowed, for that point hath been lately overruled in this Court, in the case betwixt Specot and the Bishop of Exeter, & 8 H. 5. 4 adjudged accordingly, vi. 9 H. 7. 23. And the clear opinion of the count was, that the count was good notwithstanding that exception: As to the matter of the Plea the count doubted of it, for the plea was, that the Bishop demanded, of the clark presented, his Letters of Orders, & Letters Testimoniall, of his good behaviour, and his Letters Pillibe, and he did not shew them but requested of the Bishop the space of a week, to satisfie the Bishop in those points, which was allowed unto him, but he never returned, for which cause the Bishop afterwards refused, &c. And it was said upon that Plea, That the clark who is presented, ought to make proof to the Bishop that he is a Deacon, and that he hath Orders; otherwise by the Statute of 13 Eliz. the Bishop is not bound to admit such Clarke, but the Statute doth not compell the Clark to shew his Orders, for perhaps he hath lost them, but how his Orders should be proved, it was much doubted: Anderson, The Bishop may examine him upon oath, if he hath Orders or not; But as to the Letters Testimoniall of his good behaviour and sufficiency, the Bishop ought to examine the same himselfe, and if he give day and defer the Admission because he is not resolved therein, he is a Disturber if the Clarke come to him in a convenient time: And the Bishop cannot refuse a Clarke for the want of Letters Testimoniall.

Pasch. 33. Eliz. in the Common Pleas:

CCCXIII. Linacers Case.

In an Audita Querela brought by Linacer, It was said by Anderson chiefe Justice, That if a man be in execution by his body and Lands upon a Statute;

tute; If the Sheriff permit the Consoz to goe at Liberty, yet the Execu-
tion of the Land is not discharged; But if he goe at large by the consent of
the Consoe, then the whole Execution is discharged: And the Consoz shall
have his Land againe presently.

Pasch. 33 Eliz. In the Common Pleas.

CCCXIV. Brownfall and Tylers Case.

The Case was, that Tenant in tail brought a Writ of Entry, Sur disseisin
and the Writ was generall, and it was moved, if the Writ was good
and 21 H. 6. 26. was vouched, where it is holden, that the Writ ought to be
speciall, scil. to make mention of the tail: But it was holden by the Court,
that the generall Writ is good enough. And then the count ought to be spe-
ciall, vi. Fitz. 191.

Trinit. 30. Eliz. In the Kings Bench.

CCCXV. Ward and Knights Case.

In an Action upon the case, the Plaintiff declared, That whereas Lostock
Parcell of the Manor of E in the County of Suffolk is an ancient Towne, Toll.
and ancient Demesne of the Crowne of England, and that, time out of minde,
&c. all the men, and Tenants of ancient Demesne ought to be quitted of
Toll in all places within the Realme, for them, their Goods and Chattells,
&c. And whereas the Queen by her Letters Patents the tenth of Septem-
ber, the nineteenth of her Reign, commanded all Mayors, Bayliffs, Consta-
bles, &c. to permit and suffer the men and Tenants of ancient Demesne, to
be quit of Toll, Purage, and other exactions throughout the whole Realme;
And whereas the Plaintiff was an Inhabitant, and Tenant in Lostock afoze-
said, and such a day and yeare carryed his Goods to Yarmouth in the said
County, the Defendant not ignozant thereof, had taken and carryed away a
Cable of the Plaintiffs goods, of the value of eight pounds for Toll, to his
damage, &c. The Defendant pleaded by Protestation, that Lostock was not
ancient Demesne, and by Protestation that the Tenants of ancient De-
mesne ought not to be quit of Toll, he said, That the Towne of Yarmouth Prescription,
is an ancient Borough, and that they had been incorpozated by the name of
Bayliff and Burgesles, &c. And that they have had, time out of minde,
&c. an Officer called a Water-Bayl, and that, time out of minde, &c.
they and their Predecessors have had and taken Toll of the Tenants and
Inhabitants of Lostock, for any of their goods brought thither to Merchan-
dize with, and if it be not paid, they have used time out of minde, to distraine
for it by their Water-Bayl: And said, that the Plaintiff such a day brought
to the said Towne of Yarmouth, two thousand weight of Cable Ropes
to sell, for which there was due for Toll six pence, for Purage six pence,
for Thynage four pence, and the Defendant being Water-Bayl demanded
of the Plaintiff the said summe which he refused to pay, for which he took the
said Cable, nomine districtionis, for the said Thynage, &c. Golding for tet
Plaintiff, the Defendant hath not set forth in himself any authority to demahe
the outy: For he shewes, that they have used to distraine by their Water
Bayl, but not that they have used to demand it by him, and it may be, ter-
they have severall Officers, one to demand it, and another to distraine forhat
And alwayes when a man demands a thing against common Right, he it n
to

to shew authority expresse in the whole : And as to the matter in Law, scil. The Prescription to have Toll of the Tenants in ancient Demesne, it can not have a lawfull beginning : As 21 H. 7. 40. The Lord of a Mannor saies, that he hath had a Pound within his Mannor, time out of mind, &c. And that he hath used to have of every one who breaks his Pound, three pounds, the same is a void custome to bind a stranger, for it cannot have a lawfull beginning, and see 5 H. 7. 9. b. One prescribed, that if any Castell be taken in such a place, Damage feasant, that he might distraine them and put them in Pound untill the Owner had made amends, at the will of him who distrained them, the same is a void Prescription, for it cannot have a lawfull beginning, and time cannot make such a thing to be good, The King may grant Tollage, Pontage, &c. but not to the prejudice of another, as 22 E. 3. 58. The King cannot grant to one a thorough-toll to passe by Highways, for it is an oppression to the people, for every High-way shal be common to every one, see 16 E. 3. Grants, 53. and here the Tenants of ancient Demesne are quit of Toll by the common Law, and not by Prescription, which see Fitz. 14. and such Tenants have an Inheritance in such Liberties, which the King by his grant cannot take away, & then if it cannot have a lawfull beginning, it cannot be good by Prescription : also this Prescription is against the Common-wealth, therefore it is a void Prescription, and the Common-wealth is much respected in Law, and things which in themselves are justifiable by reason, are not justifiable if they be injurious to others, as 21 E. 4. & 8 E. 4. 18. Fishers may prescribe to dry their Nets upon the Lands of others, and none can prescribe against such a Prescription, so here, all Lands which are ancient Demesne, are holden in Socage, so as they were all Husbandmen, who manured their Lands for the sustentation of the Kings Subjects, to which they had such priviledges to be the better able to follow their Husbandry, and therefore to disable such profitable Subjects, and to prescribe against these Liberties and Priviledges, is to take away the name of ancient Demesne, and to make their Lands at the common Law. Hobart contrary : So shew the authority to demand is not necessary, for our Prescription is not upon demand to distraine : For the common Officer hath authority to demand, for they ought to demand it, who ought to take the thing demanded, and those are the Bayliffs and Burgeses, and then when their Water-bayle doth it, it is as much as if it had been done by the corporation, which see 48 E. 3. 17. The Mayor and comminalty of Lincolne, brought an action of covenant against the Mayor and Comminalty of Derby, and declared, that the Mayor and comminalty of Derby had covenanted with the Mayor and comminalty of Lin. that they should be quit of Purage, Pontage, Custom & Toll within the Towne of Derby, of all Merchandises of those of the Towne of Lincolne, and further declared, That I W and H M, two Burgeses of the Towne of Derby, had taken certain Toll of certaine Burgeses of the Towne of Lincolne, &c. Exception was taken to this Declaration, because they had alleadged the taking of such Toll, not by the corporation of Derby, but by I and H, two of the Burgeses of it, in which case the Plaintiffs might have an action of Trespass against the Burgeses, for the act of any of the corporation is not the breaking of the covenant, made by the comminalty, but it was not allowed; for if the common Officer of the Towne doth any thing for their common use, as it is intended such thing was done by the Officer, it is reason all the Towne be answerable for it, and the whole comminalty by intendment cannot come at one time to take, &c. and so in our case, for as much as the corporation ought to make the demand, and their common Officer doth it to their use, the same is the act of the whole corporation. As to the matter in Law, we have pleaded specially, That we took Toll only of those things which are brought by Sea by Merchants, and not otherwise, and I conceive that Tenants in ancient

cient Demesne, are not discharged of Toll for all things, but only for such which arise out of their Tenements, or are bought for their Tenements or Families there, and their sustentations, according to the quantity of their Tenements, 9 H. 6. 25. 19 H. 6. 66. They shall be quit of Toll, of all things sold and bought coming of their Lands, or for the manurance of their Lands: And 7 H. 4. 111. Tenants of ancient Demesne, ought to be quit of Toll for Open or Beasts bought and sold for tillage, and manurance of their Lands, and for their sustentance and maintenance of their Families, and for putting them to Pasture to make them fat and more vendable, and so to sell them, &c. And see accordingly, F.N. B. 224. D. See Crook 138. 138. 28 Eliz. A Judgment was given for the said parties, for the Plaintiffs: but there the Plaintiff declared generally, and the Defendant did demur in Law generally, wherefore by common intendment, the Cattell were bought for the tillage and manurance of their Lands: For there it was not shewed (as it is here) that it was to Berchindize: Also we have justified, not only for Toll, but also for Trouage, and that they have not shewed, and therefore as to the Trouage our justification is good enough, for their privilege shall not be construed to extend beyond the words of it: As the privilege of the Law is, That if I leave my horse at a Smiths Forge to be shod, there my horse cannot be distrained, but if I or my servant take the Saddle from the Horses back, and lay it in the Smiths Forge, the Saddle may be distrained. Then here are two customes meeting together, and to begin together, and the one was not before the other, then the particular custome shall stand: And I conceive that by the Writ, de exoneracione sect. Fitz. N. B. 161. b. The Tenants in ancient Demesne, have not always such privileges, for the Writ saith, quod si ita sit, then, &c. and nisi ipsi, & eorum antecessores tenentes de eodem manerio venire consueverunt temporibus retroactis, and see the same matter in the Register, 181. And afterwards, Judgment was given, quod querens nihil capiat per billam, for the Justices were of opinion, that the Tenants in ancient Demesne should pay Toll, for their Berchandises.

Mich. 32. & 33 Eliz. in the Kings Bench.

CCCXVI. Lancaster and Lucas Case.

Thepasse was brought for entering into the Parsonage-house of Ringhall, Leases. And divers Lands appertaining to it: The Defendant being Farmer of the Parsonage, pleaded, Not guilty; and the Jury found, that one Tybbin was Parson of the said Church, and that one Ash and Dorothy his Wife, Wivell and Drauseild were Patrons of the said Church, scil. Ash and his Wife in the Right of his Wife, Wivell as Tenant by the Curtesie, the Reversion to his Son, and Drauseild also as Tenant by the Curtesie, but with-out Issue by his Wife, &c. so as the Inheritance of the said Parsonage was in Wivell and Ash: and afterwards the Bishop of Chester being Ordinary, the Parson and Patrons, 4 E. 6. joynd in a Lease of the Rectory (which Lease was void as to the Wife of Ash) to S. who assigned it to the Defendant. All the Lessors dyed: and further found, that Ash and Wivell were Heires of the Patronage, and that the Church being void, the Presentment came to the Bishop by reason of Lapse, and that the Successor of the Bishop had Collated his Clerk. Cook argued, And he conceived that the same
H h now

Attornment.

now Incumbent should avoid the Lease in toto; and the case is but this: Three Coparceners Patrons of an Advowson, or Tenants in Common, the Parson, three Patrons, and the Ordinary joyn in a Lease (where the one of them is a feme-covert; and so her Act void) If the Successor of the Incumbent being presented by Lapses shall avoid it in all: and he conceived that he should, for all three have interest in the Parsonage, and all three ought to agree, but the agreement of the one is worthy nothing: But it hath been said, that that is but matter of assent, and that the assent of the one is as strong as the assent of them all; As if many Joynt-tenants hold by certain Services, and the Lord granteth the Services to a stranger, and one of the Joynt-tenants attorneth to the Grant, the same is as sufficient as if they had all attorned, *Lit. 128. 566.* Otherwise it is of a Rent-charge, for there all the Joynt-tenants of the Lands charged upon the grant of the said Rent ought to attorn to the Grant; for the Tenant ought to attorn, and one of them is not Tenant: And in case of a Rent-charge, the Advowry is upon the Lands: but Attornment differs from our case, for Attornment is but a bare assent, without any interest in him who attorns, for an Abator may do it, but here is matter of Interest, and in Attornment, Attornment for one acre is effectual for all, *18 E.3. Fitz. variance 63.* but otherwise it is in case of Confirmation for one acre, the same doth not extend to the rest, for in such case an Interest passeth. So here, the one of them is not Patron, therefore all of them ought to concur, *31 E.3. Grants 61.* That such act of the Patron shall not bind but according to the Estate of the Patron, which see *Lit. 112. 328.* as if Tenant in tail confirm, the same shall not bind the Presentee of the issue, see *Fitz. Grants 104. Int. R. 2.* The case was that the Bishop of Covent. and Lichfield had two Chapters, one of Coventry, the second of Lichfield, and he made a Conveyance, but one Chapter only did confirm it, the same doth not bind the Successor, for both are but one Chapter in respect of the Bishop, and see the case abridged by Scatham to Aulse, for the Bishop is chosen by both Chapters, there a confirmation must be of them both: The case in *Dyer 11 Eliz. 281.* Thark, Bishop of Dublin, hath two Deanes and Chapters, the one surrendreth without the assent of the Bishop, and afterwards the other Dean and Chapter confirmeth a Lease made by the Bishop, the same is good: I confesse that, for the Surrender was by Act of Parliament, and so one sole Chapter remained: And in our case, the Lease cannot be good in part, and void for the residue, for all are but one Patron, as *22 H.6. 47.* Two Coparceners are, they make composition to present by Turnes, a Writ of Annuity is brought against the Incumbent, he shall have aid of both, and see the Case betwixt Gore and Dawboey in the Exchequer Chamber upon a Writ of Error, where two are accountable, an Account made by the one is not good, for both the Accountants shall make but one account, and therefore the Account of the one cannot be good: And the Lord Anderson put this Case, two Joynt-tenants of a Pannoz, the one of them doth grant a Copy, the same is void, for he is not Dominus pro tempore: And see as to the assent of them all, &c. *3 Eliz. 190. Dyer.* But it hath been objected, That now the Incumbent comes in by the Ordinary, and not by the Presentment of the Patron, and the Ordinary is bound by the confirmation of his Predecessor, as to that the collation of the Bishop by Lapses, is in the right and freed of the Patron, and as the Presentee of the Veire of the Patron shall avoid, &c. so also of the Ordinary: and *30 E.3. Bar. Presentment 12.* The Patron shall have a Writ of Warden-presentment upon the presentment of the Bishop for Lapses, and *22 H.6.* If a man recover an Advowson, and after the Bishop collate for Lapses, the same is an Execution of the Judgment, & will make a possessio fructus, as Moyle saith, And in our case this

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this Confirmation is void in all, because Non sunt concurrentes ii qui in hac parte concurrere debuerant: And it is an entire Act, and cannot be aboyed in part, and stand so; the residue, and the Presentee comes in in the right of the Petre for which he shall aboyd it, &c. Popham contrary, It is to be here considered, if the Ordinary hath Interest in the Church by this Lapse, or only an authority, for if he hath an Interest, then it will follow, that every one of his Successors shall be bound by his Confirmation, and also their Presentees: It hath been objected, that there ought to be a full and entire Patron who makes such a Lease, otherwise it is void: But that is not so, as if the Patron be Tenant for life, his Lease or Confirmation shall not be void in all, but shall be good during his life, which see 31 E. 3. Grants 61. and 19 Eliz. 356. A Parson makes a Lease for forty yeares, the Bishop being Patron and Ordinary confirms it, the Patron dyeth, the Bishop presents, and afterwards is translated, this Lease shall stand during the life of the Bishop, and of the new Incumbent who sound the Church charged; and then such Lease may be good for part, and void for part, see for the same, 2 E. 3. 8. If the Abbotson of a Church be appropriated unto a Prior and his Successors, if afterwards the wife of the Grantor be endowed of it, and present her Clerk, the Church is become dis-appropriated during the life of the Wife, but afterwards shall stand, vi. the case cited to the contrary, 29 Eliz. in the case of the Earle of Bedford, c. 7. part 8. At the beginning the Patron was not restrained to any time to present his Clerke, but the six months was appointed at the instance and suit of the Ordinaries by a Canon, confirmed in the councell of Lateran, before which time, the Ordinaries had not any Lapses, but after the said Canon, they had an Interest in the Church, and this appeareth in the Register: And see F.N.B. 37. f. that after the Ordinary is entitled to Lapses, The Plaintiff in a Quare Impedit cannot have a Ne admittas, for now the Ordinary hath an Interest: And if the Bishop hath Title to present by Lapse, and before Presentment he dyeth, so as his temporalties comes to the King, the King shall present, which proves that it is an Interest, and the Civilians call it Interest, caducum & conditionale: And in our case the confirmation of one Coparcener shall binde the other Coparceners, in Natio habendo, shall binde them all, and the villaine shall be free for ever. And it was moved, also that if an usurper, or the Clerk who is in by him shall aboid this clause, and by the words of the Statute of West. 2. Si tempus semestre transierit per impedimentum alicujus, ita quod Episcopus Ecclesiam conferat, & verus Patronus ea vice presentationem suam amittat, adjudicentur damna ad valorem Ecclesie pro duobus annis; Therefore what the Patron leaseth, the Ordinary hath the same, therefore it is an Interest, and in lieto of that losse the Statute gives damages to the Patron, &c. And the Case was adjourned to be further argued at another day, &c.

15th 33. Eliz. Rot. 392. In the Kings Bench.

CCCXVIII. Pet and Baldens Case.

In a prohibition the Plaintiff declared, that whereas Michael Pett was Lord of diverse Lands, and made his Will, by which he made the Plaintiff his Son his Executor, and thereby devised unto A his Wife one hundred pounds, in consideration and recompence of her Dowry of all his Lands, &c. Prohibition.

ed, and the said A took to Husband the Defendant: And that after betwixt the Plaintiff and Defendant, colloquium quiddam habebatur, &c. upon which conference and communication, the Defendant in consideration that the Plaintiff promised to pay to him the said one hundred pounds, promised to make to him a discharge of the said one hundred pounds, and also of the Dowry of his Wife, and shewed further, that notwithstanding that the said Peter was ready, and offered the said one hundred pounds, and Dowry also, yet, &c. Upon which there was a Demurrer in Law; It was moved by Tan. that here is not any cause to have a prohibition, for the agreement upon the communication is not any cause, for it doth not appeare that it was performed. Coke, A Prohibition lyeth, for the Wife cannot have both, money, and Dowry, for that was not the meaning of the Devisal, and therefore it hath been holden, that if a man deviseth a Terme for years to his Wife, in satisfaction and recompence of her Dowry, if she recovereth Dowry, she hath lost her Terme; Also here is modus and conventio which alters the Law, scil. mutuall agreement: So if the Parson and one of the Parishoners agree betwixt them that for forty shillings per annum, he shall retaine his Wythes for three years, &c. as it was in the Case betwixt Green and Pendleton, &c. it is good.

Mich. 32. & 33. Eliz. In Banco Regis.

CCCXIX. Martingdall and Andrewes Case.

Action upon
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Way.

IF an Action upon the Case, the Plaintiff declared, that one Mildmay was Leised of a House in A, and that he and all those whose estate, &c. time out of minde, &c. have had a way over certaine Lands of the Defendants called C. pro quibusdam averijs suis, and shewed, that the said Mildmay enfeoffed him of the said House, and that the Defendant kept the said way, to his damage, &c. And it was found for the Plaintiff, and it was moved in Arrest of Judgment, that the title to the way is not certainly set forth, i. e. pro quibusdam averijs suis, quod omnes Iudiciiarii concesserunt, But Gawdy Justice conceived, that the same was no cause to stay Judgment: For it appeareth to us, that the Plaintiff hath cause of Action, although that the matter be incertainly alleged, and of this incertainty the Defendant hath lost the advantage, having surceased his time by pleading to it, as 20. E. 3. Trespasse for taking and carrying away of Charters, the Defendant pleaded Not guilty, and it was found for the Plaintiff to the damage, &c. And Error was brought, because the Plaintiff had not set down in his Declaration, the certainty of the Lands comprized in the Charters: But non allocatur, for the Defendant ought to have challenged that before, and also 47 E. 3. 3. In a Writ of Covenant the Plaintiff declared of a Covenant, by which the Defendant covenanted with the Plaintiff to assure to him all his Lands and Tenements which he had in the Countie of Gloucester and Lincolne, and declared, that at a certaine day he required the Defendant to make him assurance of all the Lands, &c. And the Writ of Covenant was generall, quod teneat conventionem de omnibus terris quod habet in, &c. And it was objected (as here) that the Writ wanted certainty, as how many Acres, or such Mannors, but non allocatur, for here the Plaintiff is not to recover Land, but only Damages, and the Writ was awarded good. Fenner Justice, the Cases are not like to the Case at Bar, for in the said Cases, the certainty is not needfull, but for the taking of the Damages; but here, the certainty of the number of the Castell is part of the title.

Mich. 32. & 33. Eliz. In the Kings Bench.

CCCXX. Beale and Taylors Case.

UPON Evidence to a Jury. It was holden by Gawdy and Clench Justices, that if a Lease for yeares be made, and the Lessor covenants to repair during the Terme, if now the Lessor will not doe it, the Lessee himself may doe it, and pay himself by way of Retainer of so much out of the Rent, which see 12 H. 8. 1. 14 H. 4. 316. A Lease for yeares by Indenture, and the Lessor covenants to repaire the Houses, and afterwards the Lessor commands the Lessee to mend the Houses with the Rent, who doth it according, ly, and expends the Rent in the charges, &c. See 11 R. 2. Bar, 242. The Lessor covenants, that the Lessee shall repaire the Tenements when they are ruinous, at the charge of the Lessor; In debt for the Rent, the Lessee pleaded that matter, and that according to the Covenant, he had repaired the Tenements being then ruinous with the Rent, and demanded Judgment, if action, &c. and good: Fenner Justice contrary, for each shall have action against the other, if there be not an expresse Covenant to do it. Quere, If the Lessor covenant to discharge the Land leased, and the Lessee of all Rents, Charges, issuing out of it, If a Rent charge be due, if the Lessee may pay it out of his own Rent to the Lessor, *ad quod non fuit responsum.*

Leases, *re*
Retainer of
Rent.

Mich. 32. & 33. Eliz. In the Kings Bench.

CCCXXI. Offley and Saltingston, and Paynes Case.

OFFLEY and Saltingston, late Sheriffs of London, brought an action upon the Case against Payne, because that he being in Execution under their custody for fifty three pounds, in which he was condemned at the Suit of one Spicer, made an escape, the debt not satisfied, by reason whereof they were compelled to pay the money; The Defendant confessed all the matter, but further pleaded, that after the Escape, Spicer had acknowledged satisfaction (being after the Escape) upon Record of the sum recovered, upon which there was a Demurrer: Owen Serjeant argued that the acknowledging of satisfaction, being after the Escape, was not any Plea, for when the Plaintiffs, Sheriffs, have paid the money recovered, there was no reason that Spicers acknowledging satisfaction should stop the Sheriffs of their Remedy against Payne: It was holden by the Justices, that the Plaintiffs in this Action ought to shew, that they had been impleaded by him who recovered, for they cannot have this Action before they are sued. For perhaps the Plaintiffs who recovered but be contented to hold themselves to the Defendant, and to be satisfied by him; It was said by Glanvill Serjeant, that by the Escape the Debt was cast upon the Sheriffs, and the Defendant discharged: And that it was the Case of Sir Gervas Clyfton, who being Sheriff suffered him who was in Execution, and in his custody to goe and see a Play, and the same was adjudged an Escape, and the party could not be in Execution againe: And then he said, that this acknowledgement of satisfaction could not be any Bar to the Plaintiffs: At another day the Case was moved againe. And then it was the clear opinion of the whole Court, that the Action was maintainable, although that the Plaintiff in the first Action had acknowledged satisfaction: And it hath been adjudged here in this Court, in the Case betwixt Hill and Hill, that notwithstanding such satisfaction, that the action lyeth. See F.N.B. 130. b. for the payment after doth not take away the Action, but mitigate the damages onely, for the Act of a third person shall not take away an Action once begun.

Escape.

Mich.

Mich. 32 & 33 Eliz. In the Kings Bench.

CCCXVII. Greenliff and Bakers Case.

Assumpsit.

The Plaintiff declared, that whereas he was bound to the Defendant in an Obligation of forty pounds for the payment of twenty pounds, the Defendant the second of No. after, in consideration that the Plaintiff at the Request of the Defendant had paid the said twenty pounds without suit at Law, promised to deliver to the Plaintiff before such a day, an Obligation by which one A. was bounden to the Defendant in forty pounds, with a Letter of Attozney to demand the same of the said A. and to sue for it in the name of the Defendant which he had not done, and in that matter the Plaintiff had Judgement, and thereupon the Defendant brought a Writ of Error; First here is not any consideration, for the payment of the money is no more then he ought to doe, and which he was compellable to doe, &c. Secondly, the same is no benefit to the Plaintiff, but only a matter of charge, to sue the said Bond against A. Thirdly upon the Venire facias, the Sheriff returned but twenty three Jurors. As to the first Error it was the opinion of Gawdy and Fenner Justices, that here is not any consideration, for the Defendant hath not any benefit by it, and the Plaintiff doth no more then he ought to doe, and the payment was in respect of the Debt, and not of the Defendants Request. And by Gawdy upon this promise, an action doth not ly, for the Plaintiff is not to have any benefit by it, but travell. Fenner contrary, and that the action lyeth for that; as to the third Error, the same is helped by the Statute of 32 H. 8. and the Statute of 18 Eliz. of imperfect and insufficient returne of any Sheriff: Fenner, Not only the returne is naught, but also the Pannell is insufficient. And it was moved by Tanfeild, that it was adjudged in this Court, Pasch. 25 Eliz. Wetwirt Cook and Hoet, that where A was bounden to B in forty pounds, B promised to A. that if A would pay the money without suit he would deliver him the said Bond, by which he is bound to the said B., and it was holden a good consideration, Quod sit consensum per totam curiam, but that is not like to the case at Bar, and it was holden in the same Plea, That if the Obligor pay the duty at the day and place, that if the Obligee will not deliver the Bond; Pet the Obligor shall not have Detinne for it.

Mich. 32. & 33. Eliz. In the Kings Bench.

CCCXXII. Guilfords Case.

Indiement
upon the Sta-
ture of 13
Eliz.

Guilford was indicted upon the Statute of 23. Eliz. cap. 1. for with-drawing divers persons, her Majesties Subjects from the Religion established in England to the Roman Religion; and to promise obedience to the Church of Rome, and for that he himselfe was with-drawn from the obedience of the Queen. Coke took Exception to the Endiement, because that the Indiement was not found within the yeare after the offence committed. In the said Act, there is a Proviso, That all offences against the Act, shall and may be enquired of within the yeare and day after the offence committed. Popham Attozney Generall, This case is not within that Proviso, but doth depend upon other Statutes before viz. 1. 5. & 13 Eliz. touching the acknowledging of her Majesties supream Government in causes Ecclesiasticall, or other matters touching the service of God, or coming to Church, or establishing of true Religion within this Realme, shall and may be enquired as well before the Justices of the Peace, as other Justices named in the said Sta-
ture

tute, within one yeare and a day after such offence committed: And he said, these words in the Proviso refer only to such offences contained in the said Act, which toucheth the supremacy and causes Ecclesiasticall, &c. And such offences ought to be enquired within the yeare and day; But this Indictment here doth consist upon other matter, for with-drawing himselfe from the obedience of the Queen, which is an offence out of the compass of the said Proviso, and therefore the enquire of it not restrained unto any time, and the Statute of 13 Eliz. extends to Wills, Writings, Instruments, &c. and not to the words (with-drawing by words) which is supplied by 13 Eliz. (with-drawing by other meanes) and the restraint of Enquiry at the time, goes to the hearing of Passe, and saying of Passe, and not (repairing to the Church) but as to with-drawing, the same is at large, not restrained by that Statute: And he said, that this Indictment doth consist upon many offences, some, to offences within the Proviso, and as to those, the Indictment is void: Some to other offences, as Treason, the offence of with-drawing, the Enquiry of which is not restrained, and therefore this Indictment shall stand: Also it was the intent of this Statute, not to restrain this Court, but only the Justices of Peace, for they are specially named, Coke, and he conceived that this word, touching, &c. did not extend to any thing contained in the Statute of 23. Eliz., but only to offences within the Acts of 1. 5. & 13 Eliz. which were incertaine before, also this Proviso is in the Dissunctive, against this as against the Acts of 1. 5. or 13 Eliz. so as that which followes is to be applied to the last Dissunctive, and not to the whole sentence, and alwayes when a thing is named certain, and after generall things, the words subsequent shall be referred to the generall words, and not to that which is certaine. Also, if (touching, &c.) doth refer to this Statute, the sentence would have begun with it, but here it begins with the Supremacy, of which nothing is spoken in this Statute, and therefore it ought to be referred to the Statute which begins with it, and that is 1. Eliz. and then it shall be preposterous to come after 23 Eliz. and these words (shall and may) ought to be so construed (shall) is restrictive of it selfe, and (may) shall be referred to that which was restrained before, as the proceedings upon the Statute of 1 Eliz. cap. 2. were restrained to the next Sheriffs, and he conceived, that this Court is as well restrained to Time as any other Court, for the words are, as well before Justices of the Peace, as before other Justices named in the said Statutes, and in the Statute of 5 Eliz. This Court is especially named: Wray, this Proviso begins with Justices of the Peace, therefore it doth not extend to offences which are Treason, and the meaning of this Statute of 23. Eliz. was to enlarge the Statutes of 1. & 5. Eliz. for where the offence against the Statutes before, was to be enquired at the next Sessions, and the other with-in six moneths, now by this Statute it may be enquired at any time within the yeare and day, but it doth not extend to restrain the proceedings against offences of Treason, for the words of the Statute are, That such offences shall be required before Justices of Peace within a year, &c. But in the next clause, that the Justices of Peace against all offences against this Act, but Treason by which it appeareth, that no offences are restrained to time, but those which Justices of the Peace have authority to heare, and determine, and that is not Treason: Gawdy to the same purpose: For all the Proviso is but one sentence, and there the whole shall be referred to spirituall offences, as the not coming to Church, &c.

Mich. 32. & 33. Eliz. In the Exchequer, Error.

CCCXXIII. Fillcoks and Holts Case.

In an Action by Fillcoks against Holt, Administrator of A. the Plaintiff declared, how that the Husband of the Defendant, who dyed intestate, was indebted to the Plaintiff in ten pounds by Bill, and that the Defendant in consideration, that the Plaintiff would permit the Defendant to take Letters of Administration, and give to her further day for the payment of the said ten pounds, promised to pay the said ten pounds to the Plaintiff, at the day: And upon a Writ of Error brought in the Exchequer, upon a Judgement in the Kings Bench, in that case, It was assigned for Error, that here is not any consideration, for by the Law shee is to have Administration, being wife of the Intestate, and as to the giving of further day for the payment of the ten pounds, the same will not make it good, for it doth not appeare that shee was Administratrix at the time of the promise made, and then shee is not chargeable, and then, &c. And such was the opinion of the Court. And it was said by Periam Justice, and Manwood cheife Baron: That the Bishop might grant Letters of Administration, to whom he pleased, if he would forfeit the penalty limited by the Statute: Also it was said, where an Executor or Administrator is charged upon his own promise, Judgement shall be given, de bonis proprijs, for his promise is his own Act.

Mich. 33. Eliz. In the Kings Bench.

CCCXXIV. Adams and Bascalds Case.

Action upon
the Case.

An Action upon the Case was brought, and the Plaintiff declared, That where such a one, his Servant, departed his service without cause or license, the Defendant knowing him to be his servant, did retain him in his service, and so kept him. Tanseild, The Action doth not lye, for if my Servant depart out of my service, and another doth retain him, an action doth not lye at the Common Law, if he doe not procure him to leave my service, and afterwards retain him, or immediately taketh him out of my service. And this Action is not grounded upon any Statute, See 11 H. 4. 176. 47 E. 3. 14. 9 E. 4. 32. Gawdy, The Action lyeth, for here is damage and wrong done to the Plaintiff. Fenner contrary, For the wrong is in the departure, and not in the Retainer, and upon the Statutes it is a good Plea to say for the Defendant, that the party was vagrant at the time of the Retainer, and he (sciens) doth not alter the matter.

Mich. 32. & 33. Eliz. In the Kings Bench.

CCCXXV. Nash and Mollins Case.

Prohibition.

Tythes.

Nash and Usher sued a Prohibition against Mollins, for that the Defendant had libelled against them in the spirituall Court, for Tythes of Wood, growing in Barking Parke in Essex; The other did surmise that the Lands were parcell of the possessions of the Prior and Convent of Cree Church, and that the said Prior and his Successors, time out of mind, &c. had held the said Lands discharged of Tythes, and held them so, at the time of the Dissolution, &c. and the other part traversed it, whereupon they were

at

at Kne, if the Prior, &c. held the Land discharged, tempore Dissolutionis, &c. And now on the part of the Plaintiff in the Prohibition, certain old persons were produced, who remembered the time of the Monasteries, and that they did not pay any Tythes then, or from thence: Exception was taken to the suggestion by Coke, That here is nothing else then a Prescription, de non decimando, for here is not set forth any discharge, as composition, unity of possession, privilege of order, as Templarii Hospitarii, &c. Fennier Justice: Spirituall persons may prescribe in non Decimando, for it is not any prejudice to the Church: Wray, Although it is not set down the speciall manner of the discharge, yet it is well enough, for we ought to take it that it was by a lawfull meanes, as composition, &c. or otherwise: For the Statute is, That the King shall hold discharged as the Abbot, &c. and we ought to take it, that it was a lawfull discharge of Tythes, tempore dissolutionis: And afterwards the Jury found for the Plaintiffs in the Prohibition: But no Evidence was given to prove, that the Defendant did prosecute in the spirituall Court, contrary to the Prohibition.

Mich. 32. & 33. Eliz. In the Kings Bench.

CCCXXVI. Sheldons Case.

Sheldon, Talbot, and two other, four persons in all, were indicted upon the Statute of 23 Eliz. of Recusancy, the words of the Indictment were, Quod illi nec eorum uterque venerunt, to any Parish Church, &c. It was moved by Atkinson, That the Indictment is not good, for uterque both refer unto one of them, and not where they are many, as here, and so is an insensible word, and so upon the matter there is no offence layed to their charge. And the Justices doubting of it, demanded the opinions of Grammatians, who delivered their opinions, that this word (uterque) both aptly signifie one of them, and in such signification it is used by all Writers: Gawdy, I conceive, that the opinions of the Grammatians is not to be asked in this case; But I agree, that when an usuall word in our Law comes in question, for the true construction of it, then the opinion of Grammatians is necessary: But (uterque) is no unusuall word in our Law, but hath had a reasonable Exposition heretofore, which we ought to adhere unto, which see 28 H. 8. 19. Three bound in an Obligation: Obligamus nos & utremque nostrum, and by the whole Court (ut erque) both amount to quilibet: And see 16 Eliz. Dyer 337, 338. Three Joynt-tenants in Fee, and by Indenture Tripartite each of them covenanteth and granteth to the others, & eorum utrique, to make assurance, and there it was holden that the word (uterque) both amount to quilibet: Wray, Admit it shall be so taken in a Bond, yet it shall not be so taken in an Indictment: As if a man make a Lease for years rendering Rent payable at the day of Saint Martin, although there be two dayes of Saint Martin in the yeare, yet the reservation is good, and the Rent shall be taken payable at the most usuall day of Saint Martin there in the Country: But in an Indictment if an offence be layd to be done on Saint Martins day, without shewing which in certain, it is not good: Fennier. The word uterque is matter of surplusage, and therefore shall not hurt the Indictment.

Indictment upon the Statute of 23 Eliz.

Exposition of words.

Mich. 32. & 33. Eliz. In the Kings Bench.

CCCXXVII. Blunt and Whitacres Case.

A Writ of Error was brought upon a Judgement given in the common Pleas in a Replevin, where the Defendant did avow as Fermoꝝ of the Mannor of F in the County of Berks, to Saint Johns Colledge in Oxford, and layed a Prescription there in him and his Fermoꝝ to distraine foꝝ all Amercements in the Court of the said Mannor, and shewed that the Plaintiff in the Replevin was presented by the Homage, foꝝ not repairing of a House being a customary Tenant of the said Mannor, according to a paine imposed upon him at a former Court foꝝ which he was amerced by the Steward to ten shillings, and was also presented foꝝ not ringing of his Swine, foꝝ which he was amerced three shillings four pence, and foꝝ these Amercements he distrained: And upon Nihil dicat Judgement was given foꝝ the Avowant to have return, upon which a Writ of Error was brought: And Error assigned, in that there is not any Prescription layed in the Avowry, foꝝ the Lord to amerce the Tenants, and of common Right, he cannot do it, See 48 E. 3. And such Amercement is extortion, foꝝ the Lord cannot be his own Judge, and therefore he ought to enable himselfe to distrain by Prescription; Another Error, because the Fine is layed to be assessed by the Steward, whereas by the Law it ought to be by the Suitors, foꝝ they are Judges, and not the Steward; Another, because, that in the Avowry it is set down, quod presentatum fuit, that he had not repaired a certaine House, but he doth not say, in fact & categorice, &c. that he had not repaired, foꝝ that is matter traversable, 4. here is no offence, foꝝ a Copeholder is not bound to repaire by the common Law, if it be not by Prescription, foꝝ he cannot have Houseboot upon the Land as a Fermoꝝ may if it be not alleadged a custome: Fenner, The Steward may assesse Fines foꝝ a contempt, but not Amercements if not by Prescription. Gawdy, The Lord of a Mannor cannot assesse Amercements foꝝ a Trespasse done to himselfe upon his own Lands, but otherwise it is of a common Trespasse, oꝝ a Trespasse done in the Land of another; but foꝝ the Distresse, he ought to prescribe, and the Judgement was reversed.

Pass. 29 Eliz. Rot. 121. In the Kings Bench.

CCCXXVIII. Page and Fawcets Case.

Error was brought upon a Judgement given in Lynn, where by the Record it appeareth, that they prescribe to hold Plea every Wednesday, and it appeared upon the said Record that the Court was holden, 16 Feb. 26. Eliz. which was dies Dominicus, & that was not assigned foꝝ Error in the Record, but after in Nullo est erratum pleaded, it was assigned at the Bar: And Almanacks were shewed to the Court in proof of it, and it was holden clearly to be Error, but the doubt was, if it should be tryed by Iury, oꝝ by the Almanacks, and it was said, that the Justices might judicially take notice of Almanacks, and be informed by them, and that was the Case of one Robert in the time of the Lord Catline, and by Coke, so was the Case betwixt Galery and Bunbury, and afterwards the Judgement was reversed.

Trin. 33 Eliz. In the Kings Bench.

CCCXXIX. *Geofries and Coites Case.*

It was found by speciall Verdict, that one Avice Trivilian was Tenant for life, the remainder to her Son in tail, the Remainder over; Tenant for life, and he in the Remainder in tail, make a Lease for life, the Remainder for life rendering Rent; Tenant for life dyeth, he in the Remainder dyeth, and his Son accepteth of the Rent of the Tenant for life in possession, who dyeth, The issue in tail entreteth, he in the Remainder for life entreteth, &c. And it was conceived that this acceptance of the Rent of the Lessee for life doth affirme also the Remainder: See Litt. Sect. 521. and such was the opinion of Gawdy and Fenner Justices.

Pasc. 33. Eliz. In the Kings Bench.

CCCXXX. *The Lord Mordant and Vaux Case.*

The Lord Mordant brought an Action of Trespass against George Vaux, and declared of a Trespass done in quodam loco, called N, parcell of the Mannor of Hawarden: The Case was, William Lord Vaux was seised thereof, and thereof levied a fine to the use of the Lord Vaux, which now is, for life, and after his decease to the use of Ann and Muriel Daughters of the Lord Vaux and their Assignes, untill Ambrose Vaux should returne from the parts beyond the Seas, and should come to the age of twenty one years, or dye, if they should so long live: And after the returne of Ambrose from beyond the Seas, and the age of twenty one years, or death, whichever of the said dayes or times should first happen, to the use of the said Ambrose and the heires of his body begotten, with diverse Remainders over: Ambrose returned, and 31. Eliz. before he came of full age (for it is not pleaded that he was of full age) levied a fine to the use of George Vaux, the Defendant in taile, with diverse Remainders over: Afterwards the Lord Vaux being Tenant for life, enfeoffed the Lord Mordant in fee, upon whom the said George Vaux entered for a forfeiture, upon which Entry, the Lord Mord. brought the Action: Duct. argued for the Plaintiff Amb. Vaux had nothing in the Lands in question, untill his returne from beyond the Seas, and his full age, & the estate doth not begin untill both be past, and he said, that no use did rise to Ambrose untill the time incurred, for the time of the beginning is uncertain and upon a Contingent, as 13 Eliz. Dyer 301. 301. A makes feoffment in fee to the use of himself for life, & after to the use of B. who he intendeth to marry until the issue which he shall beget on her shall be of the age of twenty one years, and after the issue shall come of such age, then unto the use of the said B, during her Widowhood, the Husband dyeth without issue, the wife entreteth, and her Entry holden lawfull. But Error was brought upon it; And also Calthrop's case was cited to the same purpose, 16 Eliz. Dyer, 336. This estate limited to Ambrose doth refer to the estate limited to Muriel and Ann, and not to the time, for ever the first estate is to be respected, as 23. Eliz. Dyer, 371. We in the Remainder in fee upon an estate for life, deviseth it to his wife, yeilding and paying during her naturall life yearly twenty shillings; and dyeth, leaving Tenant for life, the Rent shall not begin untill the Remainder falleth: So as the generall words refer to the beginning of the estate, although the words imply that the Rent shall be paid presently: And see also such construction. 9 Eliz 261. A lease was made for thirty years, and four years after the Lessor makes another Lease by these words, Nos dictis, 301

annis finitis, dedisse & concessisse, &c. Habend. et tenend. a die consecrationis presentium, terminis prædict. finis, usque terminum, &c. And although, prima facie, the beginning of this Terme seems uncertaine, yet the Justices did respect the former estate, and so the Lessee hath the Interest of the Terme from the making of the Deed, but no estate untill the first Terme expire: Then Ambrose before his age of twenty one years levying a Fine, the Fine shall not bind the Feoffee, for it enures only by way of conclusion, and so binds parties and privies, but not a stranger: And the party needs not to plead against this Fine, quod partes, to the Fine, nihil habuerunt, for that appeareth upon their own shewing: Wiat contrary; The state of Ambrose accrues and rises when any of the said times come, first full age, returne, death, for the words are, And after the returne of Ambrose from beyond the Seas, and the age of twenty one years, or death, &c. This word (or) before (death) disjoynes all, and makes the sentence in the disjunctive, and he cited a case lately adjudged in the Common Pleas: A Lease was made to Trewpeny and his wife for one hundred years, if he and his wife, or any child or children be, twixt them begotten should so long live, the wife dyed without issue, the husband held the Land, &c. for the Disjunctive before (child) made the sentence Disjunctive. Gawdy Justice, That had been Law if no such word had been in the Case. And Wiat said, That although the returne be uncertaine, yet it is certain enough that he shall come to the age of twenty one years, or dye: And altho this is by way of use, which needs not to depend upon any estate, and if the Remainder shall vest presently upon his returne, then it would be doubtfull, what remainder it is, if it be a Remainder depending upon the estate for the life of Ann and Muriell, or for years, i. e. untill Ambrose shall come of the age of twenty one years: But be it uncertaine, yet the fine is good, for here is a Remainder in Ambrose, and both are but particular Estates, and there is not any doubt, but that one may convey by Fine, or Bar by fines such Contingent uses, for which see the Statute of 32 H. 8. All fines to be levied of any Lands intailed in any wife to him that leveth the fine, or to any his Ancestors in possession, Reversion, &c. which word (use) goes to contingent uses, for at the time of the making of that Statute, there was no other use. Fenner Justice remembered the Case adjudged, M. 30. 31. Eliz. betwixt Johnson and Bellamy, which ruled this Case: Gawdy Justice, here is a certainty upon which the Remainder both depend, i. e. the death of Ambrose, but the Case had been the more doubtfull, if no certainty at all had been in the Case: Atkinson contrary; Here the Lord Vaux is Tenant for life, the Remainder to George in tail, now when the Lord Vaux levies a Fine, this is a forfeiture, and then the Entry of George is lawfull: It hath been objected on the other side, that his Remainder was future and contingent, and not vested, therefore nothing passed to George by Ambrose. The words are (quousque Ambrose shall returne.) This word (quousque) is a word of Limitation, and not of condition, and then the Remainder may well rise when the Limitation hapneth. It hath been said, that this Remainder is contingent, and then the Remainder which is to vest upon a contingency, cannot be granted or forfeited before that the contingency hapneth: And he cited the Case of 14 Eliz. 314. Dyer. A fine is levied to A to the use of B for life, the Remainder to B in tail, the Remainder to B in fee, proviso, That if B shall have issue of his body, that then after such issue, 500 l. paid to &c. within six moneths after the birth of such issue, the use of the said Lands, after the death of the said B, and the said six moneths expired, shall be to the said B and the heirs of his body: And it was holden, that before the said contingency hapneth, B had not any estate tail, for there it was uncertaine if the said contingency would happen, but in our case, the contingents or some of them will happen, or run out by effluxion of time, and that makes the Remainder certain in Ambrose: And

he also argued, that the Limitations are severall, by reason of the Disjunctive, and the last part of the sentence, and that the said sentence is in the Disjunctive appeareth by the subsequent words (which of the said dayes or times shall first happen). And then the return of Ambrose (so that first happened) vests the Remainder in him, and therefore the Plaintiff ought to be barred. Buckley contrary: The estate of the Daughters both depend upon a Copulative, i. e. the returne of Ambrose and his full age, and both is but one Limitation, it is clear, that the first Limitation is upon a contingent, and the Remainder cannot vest untill both are performed, and as to that which hath been said, that here is a certain Limitation, i. e. the returne of Ambrose, 18 Eliz. the Case was, Lands were given to Husband and Wife, the Remainder to such of them as should survive the other, so 2 years, the Husband makes a Lease so 2 years and death, it was holden, that although the Limitation was upon a certaine estate, yet because it is not known in which of the parties the estate secondly limited shall begin, the Lease is void; So here it is not certainly appointed when the estate limited to Ambrose shall begin, upon the return, full age, or death of Ambrose, and he said, that here are but two times of Limitation, first returne and full age, second death, returne and full age determines the estate of the Daughters, and also the death, if it shall first happen, and if these three times shall be construed in the Disjunctive, the same would overthrow the estate of the Daughters, which is an estate so 2 years determinable, upon the death of themselves or Ambrose, the last words of the Limitation doth not distinguish or disjunct it, but respects the estate precedent. And by Clench Justice, If the use limited to Ambrose, shall depend only upon the Limitation of his death, the same should be void, for then he should not be in esse to take, but the other Justices were of a contrary opinion, and that the use is good, 7 H. 4. Gawdy. Although that here be three things, yet but two times, for the words are not (or) at such of the said dayes or times, as shall first happen, for that would alter the case: but here these words ought to be intended as if they were spoken before in the Limitation of the estate to the Daughters, and cannot divide the former Limitation: and he said, that if by reason, that the Limitation upon the death, which is certaine, it shall vest in Ambrose presently, then if after the other Limitation shall fall, then his Remainder which vested in him upon the said certaine Limitation should be defeated, and should not accrue to him upon the other Limitation, which should be absurd and inconvenient, &c. It was adjourned.

Trin. 32. Eliz. In the Kings

CCCXXXI. Thomas and Wards Case.

In Ejectione firmæ, by Thomas against Ward, upon a Lease made to him of the Mannor of Middleton Cheney by one Chambers, the Defendant pleaded, that long time before the Lessors of the Plaintiff had any thing, the Bishop of Rochester was seised, and leased the same to the Defendant: the Plaintiff by Replication said, that the said Lease was upon condition, viz. The Lessee by the Indenture of the said Lease, did covenant that he would not put out, or disurbe any of the Tenants inhabiting within the said Mannor out of their Tenancies, doing their duties according to the custome of the said Mannor; and shewed, that the Defendant had put out one Ann Green a Tenant dwelling there upon a Tenement parcel of the said Mannor, late in the possession and occupation of the said Ann, and that the Bishop had repented for the condition so broken, and made a Lease to the Lessors of the Plaintiff, upon which Replication, the Defendant hath demurred in Law: Tanfield,

Tanfeild argued for the Defendant, that the Bishop had not cause to re-enter, for there is not any condition in the Case, but only a Covenant, for it comes in only on the part of the Lessee, and they are words of Covenant only, where, as every condition ought to be the words of the Lessor, and the Bishop hath sufficient remedy by Action of Covenant: But if the words had been indifferently and absolute without depending on the Lessor or Lessee, then it had been otherwise, as 3 E. 6. Dyer, 65. Non licebit, to the Lessee, are, concedere, vel vendere statum vel terminum, without the Licence of the Lessor, under paine of forfeiture, the same is a good condition, but here it is merely a Covenant, and it cannot be both: Haughron. Although the words sound in Covenant, and be the words of the Lessee, yet the Lease being made by Indenture, the same is the Deed of both, and every word in it is spoken by both parties, and although that he may have an Action of Covenant, yet he cannot thereby overthrow the Lease, as by Entry, by condition broken, and yet by the words it seems the meaning of the Indenture was, that by the breach of this Covenant, the estate should be defeated, for so are the words, sub pena forisfactar. And here by way of Action he cannot have the benefit of the whole Covenant, and therefore he shall have it by way of condition: And see the Case betwixt Browning and Peston, Plow. 131. If it happen the Rent to be behind, that then the Lessee Covenants, that although the Rent be not demanded, that the said Lease should be utterly extinct, void, and of no effect, and 24 Eliz. there was a case betwixt Hill and Lockham, where by the Indenture of Lease, the Lessee Covenanted to grind all his Corn at the Mill of the Lessor, and afterwards in the end of the said Indenture, the Lessee covenanted to performe all the Covenants, sub pena forisfactar. and by the opinion of the whole Court, the same was a condition: And see 21 H. 6. 51. where in an Obligation where A was bound to B, the condition is written in this manner, Prædict. B. vult & concedit, That if the said A doth stand to the Arbitrament of such a one that then, &c. the same is a good condition, although they are the words of the Obligor, and the Deed of the Oblige, and so here is a good condition. And such was the opinion of Wray and Gawdy, and Fenner did not contradict it: Wherefore Tanfeild said, Admit here it is a condition, yet here is not any breach of it sufficiently set forth, for the breach is assigned because he had put out a woman, unam tenentem, & inhabitantem, out of certain Lands parcell of the said Mannor, late in the possession and occupation of the said woman, and that might be, that she was but Tenant at Will, and the Covenant doth refer only to Copyholders: And it may be also, that he had disseised one of the Tenants of the Mannor, in which case, the putting out of such a Tenant being in by wrong, is no breach of the condition. Also it is not averred in fact, that Ann was Tenant of any part of the Mannor: Also the Replication is, That the said Defendant had ousted the said Ann, where she had done her duty, fecit debitum suum, before the Duffer, and that might be, that she had done her duty once, but not after, and therefore he ought to have said, that she had done her duty alwayes, before her putting out, and this word (only) being single, is too generall, for it may be understood of curtesie, where the words in the Indenture are (Doing their duty according to the custome of the Mannor.) And also it might be, that Ann Green was Tenant and Inhabitant, but was not put out of the Land which was parcell of the Mannor. And Wray said, that these Exceptions were incurable: And therefore Judgement was given against the Plaintiff.

Mich. 31. & 32 Eliz. Rot. 414. in the Kings Bench.

CCCXXXII. Harvy and Thomas Case.

The Case was, Husband and Wife seised of Lands in the Right of the Wife, the Husband alone makes a Lease by word for years: Afterwards the Husband and Wife levy a Fine, and after the Wife and Husband both dye: It was holden clearly by the whole Court, that the Conuise should avoid the Lease.

Trin. 32. Eliz. Rot. 314. In the Kings Bench.

CCCXXXIII. Sly and Mordants Case.

In an Action upon the Case the Plaintiff declared, that whereas he was seised of certain Lands, the Defendant had stopped a Water-course, by which his Land was drowned, and found for the Plaintiff, It was moved in arrest of Judgement, that it appeareth upon the Plaintiffs own shewing, that the Plaintiff hath the free-hold, and therefore he ought to have an Assize, but the same was not allowed, and therefore the Plaintiff had Judgement.

Trin. 33. Eliz. In the Kings Bench.

CCCXXXIV. Kenfam and Redings Case.

The Case was, That the Queen by her Letters Patents granted the sale of the Mannor of Brokley lying in W. and all the Lands, Pastures, Woods, Under-woods, and Hereditaments, parcell or appertaining to the said scire exceptis omnibus grossis arboribus, boscis & maremio, and further in the said Letters Patens there was a Proviso, that the Lessee should have sufficient House-wood, and Hedge-wood, &c. And if, notwithstanding the said Exception, the Lessee should have the Under-woods, was the question: And it was argued, that the Lessee should have subbois, i. e. Under-woods, for that is granted by expresse words, and the exception extends only grossis arboribus, for this word (grossis) in the exception extends to all that which follows: Gawdy Justice, If it were in the Case of a common person, its clear, that upon such matter the Under-woods are not excepted, 7 E. 6. Dyer, 79. A Lease is made of a Mannor except Timber and great Woods, the Under-woods shall passe. Fenner Justice, The Proviso, that the Lessee should have House-wood, shewes the Queens intent, that the Under-woods should not passe. Wray, If this word (bois) in the exception should not extend to Under-woods, it should be vain and signifie nothing, which should be hard in the Case of the Queen.

CCCXXXV. *Trin. 33 Eliz. In the Kings Bench.*

In an Action upon the Case the Plaintiff declared of Trover and of a Bag of money, and the conversion of it, The Defendant pleaded, that the bag of money was delivered to him as a pawne to keep untill A and B were agreed, which of them should have it, and pleaded further, that A and B were not yet agreed, who of them should have it, for which cause he kept it, absque hoc, that

he converted it to his own use, upon which the Plaintiff did demur in Law. It was moved that the Conversion is never traversable. Wray, Generally Conversion is not traversable, but upon such speciall matter as is here: As if A lend money to B, and B delibereth a thing of the value to A in pawne, now the Conversion is traversable, see the same case, 4 E. 6. Br. Action upon the Case, 113. so here. Fenner agreed with Wray.

Mich. 33. Eliz. In the Kings Bench.

CCCXXXVI. The Bishop of Lincolne and Cowpers Case.

Prohibition,
Tithes.

The Bishop of Lincolne sued a Prohibition against Cowper, who had libelled against him in the Spirituall Court for Tithes out of the Pannoz of D. And the Bishop did suggest, that he and all his Predecessors had been seised of the said Pannoz, and that as long as it was in their possessions, had been discharged of Tithes, and shewed, that in the time of E. 6. the said Pannoz was conveyed to the Duke of Somerset in free, and afterwards was re-granted to the Bishop and his Successors; It was moved, That the Prescription was not good, because de non decimando: And admit that the Prescription be good, the same is interrupted by the seisin of the Duke of Somerset, and although that the Pannoz be re-assured to the Bishop of Lincolne, yet the Prescription is not revived: as Homage Ancestrell if it be once in a Forraign Seisin, although it be re-assured, yet it is not revived. But by Wray, Gawdy, and Fenner, The Prescription is good in the Case of a Spirituall person, but not in the case of a common person. And they all were cleare of opinion, that the Prescription is not gon by this Interruption, for Tithes are not issuing out of the Lands, neither can Unity of possession extinguish them, neither are they extinguished, by a release of all right of Land, &c. See for this Case, C. 11. part of his Reports in the Case of Pride and Napper.

33. Eliz. In the Kings Bench.

CCCXXXVII. Dethick, King of Armes Case.

Indictment.

Misnomer in
an Indictment.

William Dethick, against Garter King of Armes, was indicted upon the Statute of 5 E. 6. for striking in the Church-yard: For that the said Dethick in Pauls Church-yard in London, struck IS, It was moved: If Cathedrall Churches be within the meaning of the Statute: The Court was cleare of opinion, that they were. And afterwards the Defendant pleaded, that before the Indictment found, he was created and crowned by the Letters Patents of the Queen which he shewed, cheif and principall King of Armes, and it was granted by the said Letters Patents, that he should be called Garter, and that that name is not in the Indictment, and demanded Judgement: The Kings Attorney by Replikation said, That by the Law of Armes and Honors, every one who is made King of Armes before he receiveth his Dignity ought to be led betwixt two Officers of Armes, by the Armes before the Earle Marshall of England, or his Deputy, and before him are to goe four Officers of Armes, whereof the one is to beare his Patent, another a Colar of Ewes, the third a Cozonet of Brasse double guilt, fourthly a Cup of Wine and his Patent shall be read before the Earle Marshall; And afterwards his Cozonet shall be set upon his Head, & the Colar of Ewes about his neck, & afterwards the Wine poured upon his Head: And that the Defendant had not received these Cerimonies, for which cause he is not King of Armes, nor to be called

upon which the Defendant did demur in Law; Broughton argued for the Defendant, and he took Exception to the Replication, because it is pleaded there, that *solum legem heraldorum*, Garter upon his Erastian ought to receive, &c. of which Law, this Court cannot have Cognisance, and therefore the Replication ought to be, *scil. Solum legem Anglie*: As in Appeals the Defendant wage Battell, although that belongs unto Armes and Heraldry, yet it shall be pleaded according to the Law of the Land, and shall not speak of the Law of Armes; So if an Infant be made a Knight, and he is to plead in discharge of his Wardship, he shall plead according to the Law of the Land, and yet the degree of a Knight belongs to the Law of Armes, 11 E. 1. *Rot. in* against the Earle of Richmond, who was also Duke of Brittain, who pleaded to the Writ, That he was Duke of Brittain, and not in name to the Writ, but the Court did not regard it, for they cannot have knowledge of it, so not here of the Law of Heraldry: Also this Court cannot write to the Herald to certify it, as they may to the Marshall of the King, or to the Bishop: But we have sufficiently shewed our matter, *scil. That we have Letters Patents of the Queen*, and that we were sworn in the said Office, and so we are King of Herald by matter of Record, against which is pleaded only matter in deed of ceremony and circumstance which is not materiall. An Earle is created with the Cerimonies of putting a Sword upon his back, and a Cap with a Coronet upon his head. Yet the King may create an Earle without such Cerimonies: And may also create an Earle by word, if the same be after Record, when a Knight is made, Spurs ought to be put upon his Heeles, yet without such Ceremony such degree may be conferred to any upon another, for such Cerimonies are as may be used or not used at the Kings pleasure: Afterwards it was shewed, that the same is but a name of Office, but not a name of Dignity. To which it was answered, that this word Coronatus, alwayes imports Dignity, and this is a Dignity and Office, as Earle, Bishops, &c. *Fenner Justice*, The Patent is, *Nomen tibi imponimus*, and therefore (Garter) is part of his name: And therefore he ought to be indicted by such name: And it should be hard, to give State and Degrees to Cerimonies. Cowley was of opinion, That this is but a name of Office, and therefore the Judgment good, as a Mar. Writ of Summons of Parliament sheweth, without these words (*Supream Head*) and the Writ was holden good, for it is not part of the name, but addition only: So here, *Fenner* and *Way* contrary, for the words are *Creatus*, *Coronatus*, *nomen imponimus*, Ergo, part of his name, which *Clench* also granted, and afterwards *Dethick* was discharged.

Pasc. 32. Eliz. Rot. 318. In the Kings Bench.

CCCXXXVIII. *Strait and Braggs Case.*

In an Action of Trespasse, for breaking his Close in H, the Defendant pleaded, that long befoze the Trespasse, the Dean and Chapter of Pauls, were seised of the Spannos of C in the said County of H in Fee, in the Right of their Church, & so seised King Edw. the fourth by his Letters Patents Det. An. 1. of his Reign granted to them all Fines, pro licentia Concordandi, of all their Damagers, and Tenants, Holdants, and Non-residents within their Fee, and sheweth, that ever since they have used to have such Fines, and sheweth, that 29 Eliz. A fine was leyed in the common Pleas, betwixt the Plaintiff and one A of eleven Acres of Land, whereof the place where is parcell, and the Post Fine was assessed to fifteen Shillings, and afterwards Scambler the forraign Opposer did allow to them the said fifteen Shillings, because the said Land was within their Fee: And afterwards in behalf of the said Dean and Chapter, he demanded of the Plaintiff the said fifteen Shillings.

King, who refused to pay it, wherefore he in the Right of the said Dean, &c. And by their continuance took the Distresse as Bayly, &c. so; the said fifteen Millings, and afterwards sold it, upon which the Plaintiff did demur in Law. It was moved, that it is not averred that the Land whereof the fine was levied was within their Fee, but they say that Scambler allowed it to be within their Fee, and the same is not a sufficient Averment: which the Court granted. And it was the opinion of the Court, that the Dean and Chapter cannot distraine for this matter, but they ought to sue for it in the Exchequer, as it appeareth, 9 H. 6. 27. In the Dutcheffe of Somerset Case: Cassey, This grant doth not extend to the Post fine, for fine pro licentia Cohoecondi, is the Queens Soilber, and not the Post fine, Wray. All shall passe by it, for it is about one and the same matter, and they were of opinion, to give Judgment for the Plaintiff.

11m. 32. Eliz. Rot. 451. In the Kings Bench.

CCGXXXIX. Sherewood and Nonnes Case.

Covenant.

In an Action of Covenant, the Plaintiff declared, that Charles Grice and Hester his wife were seised of certain Tenements called Withons, with diverse Lands to the same appertaining, and of another parcell of Land called Dole containing eight Acres, to them and the heirs of the body of the said Charles on the body of the said Hester his wife lawfully begotten, and so seised, 15 Eliz. leased the same to the Defendant by Indenture for years, by which Indenture the Lessor covenanted that the Lessee should have sufficient House-wood, Fencing Wood, and Hoop Wood upon the Lands during the Terme, and that further the Lessor covenanted for him his Executors and Assignes, with the Lessee, &c. That it should be lawfull for them to enter upon the Lands during the said Terme, and to have agresse and regresse there, and to cut down and dispose of all the Wood and Timber there growing, having sufficient House-wood, Fencing Wood and Hoop Wood to the Lessee, upon the Lands called the Dole, for his expenses at Withons, and further that he would not take any Wood or Timber upon the Premises, without the assent or assignment of the Lessor or his Assignes, otherwise, then according to the Indenture and the true meaning thereof: And further declared, That the said Charles and his wife so seised, levied a fine of part of the Land to R S and his heirs, to whom the Defendant attorned, and that the said R S afterwards devised the same to his wife, the now Plaintiff for years, the Re- mainder over to another, and dyed, and that the Defendant had sold and carried out of the Lands called Withons, twenty loads of Wood without the assent and assignment of the Lessor or his Assignes, for which the Plaintiff as Assignee brought the Action: The Defendant pleaded, That after the Lease John Grice and others by assignment of Hester had cut down and carried away fifty loads of Wood in the said lands called the Dole, and so they had not left sufficient Woods for his expenses at Withons according to the Indenture, for which cause he took the said twenty loads of Wood upon Withons for his expenses, upon which the Plaintiff did demur in law. Godfrey. The Plea is not good: His Plea is no more, but that sufficient Wood was not left upon the Dole for his expenses, and although there be not, yet the Defendant cannot cut Wood elsewhere, for he hath restrained himselfe by the Covenant: Also the Covenant of the Lessor is, That the Lessee shall have sufficient Wood upon the Dole for his expenses at Withons, but in his satisfaction he doth not alledge, that he had need of Wood for to spend at Withons, nor doth aver that he hath spent it there, for otherwise he hath not cause to take, &c. And the meaning was, That the Lessee should have sufficient Wood when he had need of it. Hobart for the Defendant, He would not speak to the Plea in Bar,

War, but he conceived, that the Declaration was not good, for here no breach of covenant is assigned, for the Covenant is in the Disjunctive, scil. That the Defendant should not take Wood without the assent and assignment of the Lessor or his Assignes. And the Plaintiff chargeth the Defendant with cutting of Wood without the assent or assignment of the Lessor, so he would compell us to prove more then we ought, for if he did it with their assent, or by their assignment only, it is sufficient, but if the Covenant had been in the copulative, both was necessary: And for the nature of Copulatives he cited the Case, where two Church-Wardens bring an Action of Trespass, the Defendant pleads, That the Plaintiffs are not Church-Wardens, upon which they are at Issue. The Jury find, That the one was Church-warden and the other not, and for that, the Plaintiffs could not have Judgment, for if the one of them be not Church-warden, then the Plaintiffs are not Church-Wardens, for the copulatives ought not to be disjunctive: And he cited the case lately ruled in the common Pleas betwixt Ognell and Underwood concerning Crucifield Grange, A leased unto B certaine Lands for forty years, B leased part of the same to C for ten years. A grants a Rent, charge out of the Lands, in tenura & occupatione B. It was resolved, That the Lands leased to C should not be charged with that Rent, for although it was in tenura B, yet it was not in his occupation, and both are requisite, because in the copulative; So here, the Lessee may cut Wood with the assent of the Lessor without any assignment: Also here the substance of the covenant cannot charge the Defendant, for although it be in the Negative, yet it is not absolute in the Negative, but both refer unto the covenant precedent, for the words are, That the Lessee shall not cut Woods, aliter quam, according to the intent of the Indenture, where the covenant precedent is not that the Lessee shall not cut Woods but in the Dole, but that the Lessor might cut down any Trees in the Dole leaving sufficient for the Lessee, which covenant in it selfe doth not restraine the Lessee to cut down any Trees in any part of the Lands demised, nor abridgeth the power which the Law giveth to him by reason of the demise; Then when this last covenant comes, i. e. That the Lessee will not cut, aliter, then according to the meaning of the Indenture without the assent, &c. the same doth not restraine him from the power which the meaning of the Indenture gives, and so no breach of covenant can be assigned in this. For by virtue of the Lease, the Lessee of common Right may take necessary Fuel upon any part of the Land leased: Also this first covenant being in the Affirmative doth not abridge any Interest, as 28 H. 8. 19. The Lessor covenants, That the Lessee shall have sufficient Hedge boot by assignment of the Barly, It is holden by Baldwin and Shelley, That the Lessee may take it without assignment, because there are no Negative words, & non aliter. So 8 E. 3. 10. A Rent of ten pounds was granted to Husband and Wife, and if the Husband overlive his Wife that he shall have three pounds Rent, and if the Wife do overlive the Husband, she shall have forty shillings, there it was holden that the Rent of ten pounds continued, not restrained by the severance of any of them: And although peradventure it appeareth here, that the meaning of the parties was, That the Lessee should not cut down any Wood but in the Dole, yet for as much as such meaning doth not stand with the Law, it shall be rejected, as it was holden to one in the case betwixt Benet and French, where a man leased of diverse lands, devised parcel of it called Gages, to the creating of a Schoole, and another parcell unto B in fee, and all his other Lands unto one French in fee, The devise of Gages was holden void, because too generall, for no person is named; and it was further holden, that it passed by the generall devise to French, and yet that was not the meaning of the Deviser: Also the Plaintiff is not Assignee but of parcell of the Reversion, for if the Reversion is granted to him for years, and such Assignee cannot have an Action of Cove-

nant, for a covenant is a thing in Action, and annexed to the Reversion, so that if the Reversion doth not continue in its first course as it was at the time of the creation of the covenant, but be altered or divided, the covenant is destroyed, and therefore it was holden, 32 H. 8. Westcott Wiseman and Warringer, where a Lease for years was made of one hundred Acres of Lands, rendering ten pound Rent, and afterwards the Lessor granted fifty Acres of it, that the Grantee should not have any part of the Rent, but all the Rent was destroyed. So in our case here, the Grantee hath but parcell of the estate, a Term for years, and so is not an Assignee intended, as the case be- tween Randall and Browne in the court of Chancery: Randall being seised of certaine Lands, covenanted with B, that if he pay unto him, his Heirs, and Assignes five hundred pounds, that then he and his Heirs would stand seised to the use of the said B and his Heirs; Randall devised the Land to his Wife during the minority of his Son, the Remainder to his Son in Fee and yet, having made his Wife his Executrix: Browne at the day and place tendered the money generally, the Wife having but an estate for years in the Land, took the money: It was holden, that the same was not a sufficient tender, for the Wife is not Assignee, for she hath an Interest but for years, and here, the Son is to beare the losse, for by a lawfull tender the Inheritance shall be divested out of him, and therefore the tender ought to be made to him and not to the Wife. Also as the case is here, he is no Assignee, for although Charles Grice and his Wife hath the Reversion, to them and the Heires of the body of Charles, and levy a Fine without Proclamations, nothing passeth but his owne estate, and then the Conuisee hath not any estate, but during the life of Charles, and then when a man is seised to him and his Heirs during the life of another, he hath not such an estate as he can devise by the Statute, and then when he deviseth it to his Wife for years, it is void, &c. It was answered.

Trin. 33 Eliz. In the Kings Bench.

CCCXL. Smith and Hitchcocks Case.

Assumpsit.

In an Action upon the case, the Plaintiff declared, that whereas the Defendant was indebted unto him, 19 Maij 30 Eliz. The Defendant in consideration that the Plaintiff would forbear to sue him untill such a day after, promised at the said day to pay the debt: The Defendant pleaded, how that 29 Maij, 29 Eliz. He was indebted unto the Plaintiff in the said sum, for assurance of which, afterwards he acknowledged a Statute to the Plaintiff, upon which he had execution, and had leyed the money, absque hoc, that he was indebted to the Plaintiff, antea, vel post, the said day, aliquo modo, upon which the Plaintiff did demur. It was argued that the Traverse was not good, for the consideration in Assumpsit is not traverstable, because it is but conveyance, and amount to the generall Issue, as in debt upon the sale of a Horse, it is no Plea for the Defendant to say, that no such Horse was sold to him. Partridge, If the conveyance be the ground of the suit it is traverstable, an Action upon the case against an Hostler, it is a good Plea that he is not an Hostler, 2 H. 4. 7. See 26 H. 8. Br. Traverse, 341. In an Action upon the case, the Plaintiff declared, that whereas the Defendant, habuit ex deliberatione, of the Plaintiff certain goods, the said Defendant in consideration of ten shillings, Assumpsit & eidem querenti promisit salvo Custodire, &c. Non habuit ex deliberatione, is a good Plea. Godfrey, The Defendant doth not answer the point of our Action, which is the Assumpsit, but only by way of Argument, 11 E. 4. 4. In Trespass upon the Statute of 5 R. 2. by the Master of a Colledge and his officers, the Defendant doth justify by reason

Reason of a Lease made by a Predecessor of the Plaintiff, and his Contractors by their Deed under their common Seal, the Plaintiff, Replicando saith, That at the time of the making of the Lease, there was no such Collidge, and it was holden no Plea, for it is no answer but by Argument. Gawdy Justice, In all cases where the Defendant may wage his Law, there the conveyance is traversable: Wray, The cause of the Action is the Assumpsit, therefore the consideration is not traversable, for it is not the point with which the Plaintiff is charged; And it is common here, that the Declaration in such Action upon the case, in consideration of diverse sums of money, without any more certainty is good, which should not be good, if the consideration were traversable, but the consideration is to be given in Evidence, and it is also common, that in an Action upon the case in Trover and Conversion, the Trover is not traversable, for the Conversion is the point of the Action: Fenner Justice, The debt here is not the cause of the Action, but only the Assumpsit. In debt upon Arbitrament, the Arbitrament is traversable; So in debt for Rent upon a Demise, the Demise is traversable, for the Arbitrament, and Demise is the cause and ground of the Action: At another day it was moved againe, and Gawdy, mutata opinione said, that consideration Executory, is traversable: as where one in consideration, that he may marry my Daughter, or of service promiseth to pay, the same consideration is traversable, contrary of a consideration executed: And afterwards Judgment was given for the Plaintiff.

Traverse.

Trin. 33. Eliz. In the Court of Wards.

CCCXLI, Estons Case.

Escon was seised of Lands in Fee holden of the King in chiefe, and took a Wife seised of other Lands holden in Socage, they have Issue, and the Husband dyeth; And afterwards the Wife dyeth: Owen Serjeant conceived, That the Queen should not have the Wardship of the Land of the Wife, or the primer seisin of it: And if the Husband had survived his Wife being Tenant by the Curtesie, the Queen should not have Primer seisin of it after his decease; Wray, If the Father be seised of Lands holden in Socage, and the Mother of Lands holden in Knights service, and the Husband over, lives his Wife being Tenant by the Curtesie, the King shall have all: Anderson denied that, & he conceived, That the opinion of Stamford is not Law, and yet see 13 H. 4. 278. Where the Father is seised of Lands in chiefe, and the mother of other, and the Father dyeth, and afterwards the Mother dyeth, both shall be in ward. And it was said, That if there be Grandfather, Father, and Son, and the Father dyeth seised of Lands holden in Socage, and afterwards the Grandfather dyeth seised of Lands in Knights service, the Lands in Socage shall not be in ward: Anderson held strongly, That the Queen should have Primer seisin of the Lands of the Mother: Wray contrary, Quare.

Trin. 33. Eliz. In the Court of Wards.

CCCXLII. Ellis Hartops Case.

Ellis Hartop was seised of diverse Lands, whereof part was holden of the King in Knights service, and devised two parts thereof to W Denham and his Heires, to the use of T his Brother, and his wife, and afterwards to the use of the said T and his Heires males, T dyed in the life of the Devisor, and afterwards

terwards a Son is bozne; First it was agreed that a Devise might be to the use of another; Then, when Cestuy que use dyeth in the life of the Devisor, the Devisee shall take it, and when a Son is bozne, it shall goe to him: But if the use be void, then the Devisee shall have it to his own use, for every devise doth imply a consideration: Coke was of opinion, That the Son takes by descent, when Cestuy que use, to whom Land is devised, doth refuse the use, the Devisee cannot take it, for he shall not have it to his own use, for if the use be void, the devise is also void; And the use is void, for Cestuy que use dyed in the life of the Devisor, which see Brec and Rygdens case. A man seised of three Acres, bargaines and sells one of them, without shewing which, and that before the Statute of 27 H. 8. The Bargainee dyeth before Election, no Election descends to the Heire, for then he should be a Purchasor: And by Wray, and Anderson, The devise is void, and it is all one with Brec and Rygdens case. And by Anderson, a man deviseth Lands to the use of one, which use by possibility is good, and by possibility not good; If afterwards Cestuy que use cannot take, the Devisee shall be to the use of the Devisor and his Heirs.

Trin. 33. Eliz. In the Kings Bench.

CCCLXIII. Welton and Garmons Case.

Assize.

Assize was brought of a Rent of fifty pounds per annum, and the Plaintiff made his plaint to be disseised of his freehold in H E, and H W: And shewed, that John Vaughan and Amy his Wife, who before was the wife of one Welton, and Pother of Sir Henry Welton, the Plaintiff in the Assize was seised of the said Mannors of H W, and H E, lying in Barton and Kinton in Fee. And 18 Eliz. A fine was levied betwixt Robert Vaughan, and Miles Whitney complainants, and the said John Vaughan and Amy his Wife, and Francis their Son Deforcants of the said two Mannors, inter alia per nomen, of the Mannors of H E, and H W, and of fifty Messuages, three hundred Acres of Lands, two hundred Acres of Meadows, cum pertinentijs, in the said Townes, by which fine the said Deforcants, did acknowledge the right of the said Mannors and Tenements, to be the Right of the Complainants, come ceo, &c. with warrantie, of the said Husband and Wife, for which the Complainants did render a Rent of fifty pounds, per annum, with clause of distresse, in dictis Manerijs, to the said John and Amy, and the Heirs of Amy, and also rendred the Tenements aforesaid, with the Appurtenances to the said John and Amy for their lives, the Remainder to the said Francis their Son in tail, the Remainder to the said Amy and her Heirs, and that John and Amy dyed, by force whereof the said Rent descendeth to the said Plaintiff, as Son and Heire of the said Amy, and that the said Francis entred into the said Mannors as in his Remainder, and was seised in tail, and was seised of the said Rent by the Hands of the said Francis, and afterwards thereof did excoff the said Garmons the Defendant, &c. The Tenant pleaded, That the Plaintiff was never seised so as he could be disseised, and if, &c. Nul cor, nul disseisin, which was found for the Plaintiff who had Judgement and Execution, upon which the Tenant brought a Writ of Error: Stephens assigned Error, first, the fine is levied of two Mannors, inter alia, so as to other Lands passed by the fine besides the Mannors, and so the Rent is granted out of the said Lands and Mannors, and no other Lands which passed by the fine, and then upon the Plaintiff's own shewing it appears, that all the Tenants of the Lands charged with the Rent in demand, are not named in the Assize: Secondly, Error: This Rent is granted only out of the Estate taile, for Amy hath Fee in both as well the Rent as the Land, and then when

the estate tail is determined, the Rent is also determined, and he hath not a-
 verred the life of the Tenant in tail, or any of his Issue, wherefore it shall be
 intended that he is dead without issue, and then the Rent is gon, and then he
 hath not any cause to have Assize: Bouchier, As to the first conceived and
 argued that it is not Error, for although these words (inter alia, &c.) yet it shall
 not be intended that the Conusor had any other Lands or that the Rent is iss-
 uing out of other Lands then those two Mannors which are expressed, & not inter
 alia: As to the second, the continuance of the tail needs not to be averred, for the
 Tenant in tail hath enfeofed the Tenant of the Land, by which the estate tail
 is discontinued; And although the Tenant in tail be dead without issue, yet
 the Rent doth remaine until Recovery of the Land by Formedon in the Re-
 mainder. Fenner Justice was of opinion, That the Per nomen should go unto
 the Mannors onely, and should not extend to the inter alia: For if a man in plea-
 ding saith, that J. S. was seised of twenty acres of Land, and thereof (inter
 alia) did enfeof him per nomen of Green-weade, the same shall not have re-
 ference to the inter alia, but onely to the twenty acres: And the averment
 of the continuance of the Tail needs not, for the Estate-tail is discontinued.
 Gawdy Justice was of opinion, That the per nomen should go as well to the
 inter alia, as to the two Mannors, and then all the Ter tenants are not na-
 med in the Assize, and the same needs not to be pleaded, for it appears of the
 Plaintiffs own shewing, and there needs no averment of the continuance of
 the Tail for the cause aforesaid. Clerch Justice, The per nomen doth refer
 to all, which see by the Fine, which shewes that other Lands passed by
 the fine, then the said two Mannors. And as to the second point he said,
 There needed no averment. Gawdy, As to the first Error, the same cannot
 be saved by any way, but to say, That the Conusor was not seised of any other
 Lands then the said two Mannors, and then the Fine doth not extend unto it,
 and then no Rent is granted out of it. Fenner, In the Common Pleas, in
 the great case of Fines, it was holden, that in pleading of a Fine, it needs
 not to say, That the Conusor was seised, for if the Conusor or Conussee were
 seised, it is sufficient: for such pleading is contrary in it self; for a Fine,
 for Consans de droit come ces, &c. both suppose a precedent Gift: It was
 also observed, That here is a confusion in this Fine, for the Rent is rendered
 to the Husband and Wife, and to the Heires of the Wife, and the Land is
 rendered to the Husband and Wife for their lives, the Remainder to Francis
 in Tail, the Remainder to the Wife and her Heires: And these matters
 cannot stand together in a Fine, but the one will confound the other: But as
 to that, it was said, that the Law shall parshall these two renders, so as they
 both shall stand: And it is not like unto a Rent-service, for a Rent-service
 issueth out of the whole Estate: And therefore if a Remainder upon an Es-
 tate for life Escheats, the Deignioy is gone even during the life of the Te-
 nant for life; which see, 3 H. 6. 1. contrary of a Rent-charge: For if the
 Grantee of a Rent in fee purchaseth the remainder of the Land out of which
 it is depending out of an Estate for life, he shall have the Rent during the
 life of the Tenant for life. And of that opinion were all the three Justices,
 for the Conusors took by severall Acts, and the Estate is charged, for it com-
 eth under the Grant. Fenner Justice, There is a difference betwixt a Rent
 service and a Rent-charge, or Common, for that shall charge onely the
 Possession, but a Rent-charge shall charge the whole Estate: And there-
 fore if he who hath a Rent-service releaseth to him in the Remainder upon an
 Estate-tail, or for life, the Rent is extinct; which Gawdy denied: And
 this Case was put, The Disseisor doth release to the Lessee for yeares of his
 Disseisor, nihil operatur: But if the Disseisor and Dissesee joyn in a Re-
 lease to such Lessee the same is good, for first it shall enure as the Release of
 the Disseisor, and then of the Dissesee, &c.

Mic. 32 & 33 Eliz. In the Kings Bench.

CCCXLIV Tedcastel and Hallywells Case.

Debt.

In Debt upon a Bond, the Defendant pleades, That the Condition was, That whereas John Hallywell had put himself to be an Apprentice to the Plaintiff, if the Defendant John Hallywell during his Apprentiship, or any other for him by his consent or agreement take, or riotously spend any of the Goods of his said Master the Plaintiff: If then the Defendant within one month after notice thereof given to him, do pay and satisfy the Plaintiff for all such summes of money, Wares, &c. so taken, or riotously spent by the Defendant, or by any other by his procurement or consent, the same being sufficiently proved; that then, &c. The Defendant by protestation, Quod nec ipse, nor any other by his procurement or consent had taken, or riotously spent the Goods of the Plaintiff: for plea saith, That the Plaintiff before the Suit brought had not sufficiently proved, that the said John Hallywell took, or riotously spent any of the Plaintiffs Goods: Upon which the Plaintiff did demur in Law. It was argued by Daniel, That the proof is sufficient and good for the time, if it be tried in the Action upon this Obligation: and the proof intended is proof by twelve men, for it is not set down before what person it shall be proved, nor any manner of proof appointed, and therefore it shall be tried according to the Law of the Land: which see 10 E. 11. 7 R. 2 bar 341. Godfrey contrary, This case is not like to the cases before, for here is a further matter. First morning, and a month after notice pay, &c. And if the proof shall be made in this Action, the Defendant shall lose the benefit of the Condition, which gives time to pay it within a month after; for in all such cases the precedent Act of the Obliges is transferable, as 10 H. 7. 13. I am bound by Obligation to enfeoff such a person of such Lands as the Obliges shall appoint. In an action brought against me, I shall say, That the Plaintiff hath not appointed, &c. And here ought to be notice first, and proof ought to precede the notice by the meaning of the condition, and so this differs from the other cases put, for here proof is not the substance of the whole: Owen Herjeant, It is the folly of the Defendant to lye himself to such an inconvenience, for now he ought to pay the money without delay of any month: And here the Defendant ought to plead, That he hath not impeached any goods of the Plaintiff, and the Plaintiff Replicando, shall say, And shew the speciall matter that he hath given notice to him thereof: see 15 E. 4. 25.

18. Eliz. In the Kings Bench

CCCXLV. Manning and Andrewes Case.

Devise.

In Escheione firmz, the Jury found by speciall Verdict: That Richard Hart, and Katherine his Wife, and diverse other persons, 1 H. 8. were seized of the Lands in question, to the use of Richard and his Heirs, ad perpitiendum ultimam volunt. dict. Rich. who the first of August, 8 H. 8. by his Will in writing devised, That his Executors should be from thenceforth seized to the use of his said Wife for her life, and after to the use of W H his Son for his life, without impeachment of Waste, and after the death of the said Katherine his Wife, William his Son, and Joan wife of the said William, his Executors should be seized to the use of the next heire of the body of the said William and Joan lawfully begotten, for the terms of the life of the same Heir,

and after the decease of the same Heire, to the use of the next heir, of the same heire lawfully begotten, and for default of such issue, to the use of the heirs of the body of the said William and Joan lawfully begotten, for the terme of life or lives of every such heire, or heirs, and for default of such heires to the use of the heirs of the body of the said William, and for default, &c. to the right heirs of William: And further he willed, That if any of the said heirs shall let, alien, lay to mortgage, the right, title, and interest which they or any of them shall have in or out of the same Lands, or by their consent or assent suffer any Recovery to be had against them, &c. Or do any other Act, whereby they or their heirs, or any of them may or ought to be disinherited; That then the use limited to such heire so doing, shall be void and of no effect during his life: And that his said Feoffees shall be thenceforth seised to the use of the heir apparent of such Offender as though he were dead: Richard Hart dyed, William had issue by the said Joan his Wife, a Son named Thomas and dyed, and afterwards, 31 H. 8. Joan dyed, Katharine dyed, Thomas entered, and had Issue Francis and Percivall: Thomas by Deed indented, 1 August, 4. Eliz. Bargained and sold to Andrewes, and leveyed a fine to him with warranty: And afterwards, 6 Eliz. Francis leveyed a fine to the said Andrewes, Sur conusans de droit come ceo: And further by the said fine released to him with warranty, at the time of which fine leveyed, Percivall was heir apparent to the said Francis, Francis after had issue I and F who are now living: The Use of the Survivors of the Feoffees within five years after the age of Percivall and seven years after the fine leveyed, enter to revive the use limited to Percivall, who entered, and leased to the Plaintiff. This case was argued by the Justices of the Kings Bench, &c. First, It was argued by the whole Court, That Richard Hart being seised with seven others, unto the use of himselfe and his Heirs, might well devise all the use, although his use was in part suspended because he was jointly seised with seven others, to his own use, and so the use for the eighth part suspended, for when this devise is to take effect, i. e. at the time of his death, all the possession of the Land by the Survivors passeth from the use, and then the use being withouten from the possession shall well passe: And by Wray, A use suspended may be devised: As if Feoffees to use before the Statute of 27 H. 8. be dissolved, by which dissolution the use is suspended, and afterwards during the dissolution, Cestuy que use, by his will deviseth. That his Feoffees shall re-enter and then make an estate to I S in fee, the same is a good devise, for by that devise in the trust and confidence reposed by Cestuy que use, in the Feoffees, is not suspended: Secondly, It was holden that here, a use implied was limited to Joan the Wife of William, although there be not any expresse devise of it, according to the Book of 13 H. 7. 17. Thirdly, when a use is limited to the Heir of the body of William and Joan lawfully begotten for life, and afterwards to the heire of the body of the same heire for life, &c. Geofrey Justice was of opinion, That here is in effect an estate tayle, for the estates limited are directed to goe in course of an estate tail, for he wills, That every heire of the body of his Son shall have the Land, and the speciall words shall not make another estate to passe, but that which the Law wills, As if Lands be given to one for life, the Remainder after his death to the Heirs of his body lawfully begotten, notwithstanding that the words of the limitation imply two severall estates, yet because the Law so wills, it is but one estate: Gawdy Justice said, That every issue begotten betwixt William and Joan, should have an estate for life successive, and a Remainder in tail expectant as right heire of the body of William, and this estate tail shall not be executed in possession by reason of the mesne, Remainder for life limited to the heire of the body of William and Joan, and although that these mesne Remainders are but upon a contingent, and not in esse, yet such regard shall be had to them, that

Use suspended, yet the Land devised;

A Contingent shall hinder the execution of an estate in the possession.

Vaughan and
Alcock's case.

Estate vested,
shall not be
divested.

they shall hinder the execution of the estates for life, and in tail in possession : As if an estate be made to A for life, the Remainder to the right heirs of B in tail, the Remainder in fee to A, although the estate tail be in obedience, and not in esse during the life of B, yet in respect thereof the Freehold and fee shall not be consigned. Southcote Justice, To the same purpose : And he put a case lately adjudged betwixt Vaughan and Alcock : Land was devised to two men, and if any of them dyeth, his heirs shall inherit, these devisees are Tenants in common, because in by devise, but contrary if it were by way of Grant : Lands are devised to A and B to be betwixt them divided, they are Tenants in common : Wray, William and Thomas have but for life, for they are Tenants by the name (heir) in the singular number, but when he goes further, and says, for want of such issue to the heirs of the body of William, in the plural number, now William hath an Inheritance : And if a devise be made to one for life, and then to his heirs for life, and so from heir to heir in perpetuum for life, here are two estates for life, and the other devisees have fee, for estates for life cannot be limited by generall words from heir to heir, but by speciall words they may : And here, Thomas being next heir of the body of William and Joan, hath an estate for life, and also being heir of the body of the said William, hath a Remainder in tail to him limited, the same remaineth limited to others, i. e. to the next heir of the body of Thomas being in obedience because limited by the name heir, his father being alive : Shall not hinder the execution of these estates, but they shall remaine in force according to the rules of the common Law : Then Thomas so being seised leveyeth a fine against the Provision of the Will, by which Thomas hath forfeited his estate for life, and so his next heir shall have the Land during his life : And a great reason wherefore the heirs, or supra, after the two first limitations shall have tail, is, because that if every heir should have but for life, they should never have any Interest in the Lands by these limitations, for by the expresse words of the devise, none shall take but the heirs of the first heirs for ever, i. e. When Thomas Aliens, by which the use vests in Francis, and upon afterwards Francis leveyeth a fine, then the use vests in Percivall Hart, being next heir of the said Francis at the time of the fine leveyed (notwithstanding that afterwards Francis hath a Son which is his next heir) and therefore the use in Percivall by the birth of the said Son in Francis shall not be divested, because it was a thing vested in him before by purchase, 9 H. 7. 25. A entails B upon condition on the part of A to be performed, and dyeth, having issue a Daughter, the Daughter performs the condition, and afterwards a Son is borne, the Daughter shall hold the Lands against the Son : So 5 E. 4. 6. A woman hath issue a Daughter, and afterwards consents to a Rabiher, the Daughter enters, and afterwards a Son is borne, yet the Daughter shall hold the Lands for ever, i. e. And Geofries Justice said Francis being in by force of the Feoffment, shall not be subject to the limitation of the Will, i. e. to any feoffment if he alien, for the estate which Francis hath for his life is but an estate gained by the offence of his father, and the use was limited to him upon the Will of Richard, and then the said estate is not subject to the Provision of the Will, and then hath not Francis committed any feoffment : And admit Francis shall feoff, yet Percivall shall get nothing thereby, but the estate which Francis had at the time of the fine leveyed, scilicet the Freehold only, for no estate of Inheritance was in him living his father, i. e. As to the request of the Feoffers, Geofries was of opinion, That where an use is limited to a person certain, and thereupon vested in the person to whom it is limited, That the Entry of the Feoffers in such case is not requisite, notwithstanding that the first estates be discontinued, but where the use (as in our case) is not limited to a person certain in esse, but is in obedience, not vested in any person upon the limitation of it, some estate ought to be left in the

the Feoffees to maintain that use, and to render it according to the limitation, and in our case, these uses not in esse at the time of the making of the Statute of 27.H.8. could not be executed by the said Statute, but now at the appointed time by the limitation shall be raised and revived by the Entry of the Feoffees, but here by the Fine and Non-claim, the Feoffees are bound, and their Entry taken away, and so no use can accrue to Percival Hart by such Entry. Southcote Justice was of opinion, that the Feoffees cannot enter at all, because that by the Statute of 27. H.8. nothing is left in them at the time of the making of the Statute, which saves the rights of every person, &c. other than the Feoffees, so as no right is saved to them but all is drawn out of them by the operation of the Statute, and the second saving of the Statute, saves to the Feoffees all their former Right, so as the Right which the Feoffees had by the Feoffment to the use is utterly gone. But Percival Hart may well enter, for he is not bound to the five years after the Fine levied, for he had not right at the time of the Fine levied, but his right came by the Fine, Wray chief Justice. The Feoffees are not to enter for the Statute of 27 H.8. hath two branches, 1. gives the possessor to Cestuy que use, in such manner as he hath in the use. 2. takes away all the right out of the Feoffees, and gives it to Cestuy que use, so as nothing at all remains in the Feoffees; for if an Act of Parliament will give to me all the Lands, whereof my brother Southcote is seised, and that I shall be in the Possession thereof, now is the actual possession in me without my Entry: so alwayes, where an use is often executed by the Statute, Cestuy que use, without any Entry hath an actual possession. i. As to the uses contingent, nothing remains in the Feoffees for the serving of them when they happen, but the whole estate is settled in the Cestuy que use, yet subject to such use, and he shall render the same upon the contingency: And if any estate should remain in the Feoffees, it could be but an estate for life, for the fee simple is executed in Cestuy que use, with an estate in possession, and then the Feoffees should be seised to another use than was given by them the Libery. Also if a Feoffment be made unto the use of the Feoffor, and his heirs, untill J.S. hath paid unto the Feoffor 100 l. and from thenceforth the Feoffor and his heirs shall be seised to the use of the said J.S. and his heirs, if upon such Feoffment any thing should remain in the Feoffees before the payment by J.S. the same should be a Fee simple, and then there should be two Fee simples of one and the same Lands, one in the Feoffor, and the other in the Feoffees which should be absurde, and therefore the best way to avoid such inconveniencies is to construe the Statute, that it draws the whole estate of the Lands, and also the confidence out of the Feoffees, and repositeth it upon the Lands, the which by the operation of the Statute, shall render the use to every person in his time according to the limitation of the parties: And also if any Interest doth remaine in the Feoffees, Then if they convey to any person upon consideration who hath not notice of the use, then the said use shall never rise, which is utterly against the meaning of the said Statute, and the meaning of the parties, and therefore, to construe the Statute, to leave nothing in the Feoffees will prevent all such mischief: And if a Feoffment in fee be made to the use of the Feoffor for life, and afterwards to the use of his wife which shall be for life, and afterwards to the use of the right heirs of the Feoffor; The Feoffor enfeoffeth a stranger, taketh a wife, now cannot the Feoffees enter during the life of the Feoffor, and after his death they cannot enter, because they could not enter when the use to the wife was to begin, upon the intermarriage, & then if the Entry of the Feoffees in such case should be requisite, the use limited to the wife by the Act of the Feoffor should be destroyed against his own limitation, which is strong against the meaning of the Act aforesaid, for by the said act, the Land is credited with the said use;

which shall never faile in the performance of it. And such contingent estates in Remainder may be limited in possession, a Fortiori in use, which see 4 E. 6. Colthirts case, 23. And Plesingtons case, 6 R. 2. And it is true, at the common Law, the Entry of the Feoffees was requisite, because the wrong was done unto them by reason of the possession which they then had, but now by the Statute, all is drawn out of them, and then there is no reason that they medle with the Lands wherein they have now nothing to doe, and the scope of the Statute is, utterly to disable the Feoffees to do any thing in prejudice of the uses limited, so as the Feoffees are not to any purpose but as a Pipe to convey the Lands to others; So as they cannot by their Release or confirmation, &c. bind the uses which are to grow and arise by the limitation knit unto the Feoffment made unto them, which see Br. 30 H. 8. Feoffments to uses, 50. A covenants with B, That when A shall be enfeoffed by B of three Acres of Lands in D, that then the said A and his Heirs shall be seised of Land of the said A, in S, to the use of B and his Heirs, and afterwards A enfeoffeth a Stranger of his Lands in S; And afterwards B enfeoffeth A of his Lands in D, now the Feoffee of A shall be seised to the use of B, notwithstanding that the said Feoffee had not notice of the use, for the Land is bound with the use in whose hands soever it come: And see the like case, *ibid.* 1. Ma. 59. Upon the reason of which cases many assurances have been made, for it is the common manner of Mortgage, i. e. If the Mortgagee pay such a sum, &c. that then the Mortgagee and his Heires shall be seised after such payment to the use of the Mortgagee and his Heirs; In that case although that the Mortgagee alien, yet upon the payment, the use shall rise well enough out of the possession of the Alienee, and the Lands shall be in the Mortgagee without any Entry: For the Mortgagee could not enter against his own alienation, to revive the use which is to rise upon the payment, and therefore without any assistance of such Entry, it shall arise: As at the common Law, Land is given to A in tail, the Remainder to the right heirs of B, A leveys a Fine, makes a Feoffment, suffers a Recovery, &c. although the same shall bind the Issues, yet if B dyeth, and afterwards A dyeth without issue, notwithstanding this Fine, &c. The right Heir of B may enter: And always a use shall spring out of the Land at his due opportunity, & it is a collaterall charge which bindes the Lands by the first Liberty, and cannot be discharged, vi. 49. Aff. 8. & 49 E. 3. 16. *Isabell Goodcheapes case*: A man deviseth, that his Executors shall sell his Lands, and afterwards dyeth without heirs, so as the Land escheats to the King, yet the authority given to the Executors shall bind the Lands in whose hands soever it comes, &c. And so a title of Entry doth continue notwithstanding twenty alienations: But an use is a lesser thing then a Title of Entry, especially an use in contingent, and an use as long as it is in contingency cannot be forfeited: As if the Mortgagee be attainted and pardoned mean betwixt the Mortgage and the day of Redemption, &c. Then when Thomas leveys a Fine, Francis may well enter; And Thomas before the Fine had an estate tail executed to his Freehold, and therefore by the Fine he gave an estate of Inheritance to the Conuisee, and then no right of entail remained in Francis, but he took an estate for life only, and that as a Purchasor by the limitation of the Will, and then when Francis leveyed a Fine, his estate was gone (which was but for life) and then the right of the entail, and all the other estates which are especially limited are also gone, and so *Percivall Hart*, to whom no estate was specially limited hath not any cause to enter, &c. And it was further said by *Wray*: Husband and Wife Tenants in speciall tail, the Husband leveys a Fine with Proclamations and dyeth, the Wife enters, the issue in tail is barred, but if the Wife enter after the death of her Husband, and before the Proclamations passe, the issue is not bound by the Fine: And if Tenant in tail granteth, *corum su-*

sum sum, and after ledyeth a fine thereof with Proclamations, come ceo, &c. The fine is barred, contrary where the fine is upon a Release, &c.

18. Eliz. In the Kings Bench.

CCCXLVI. Henningham and Windhams Case.

Archur Henningham brought a Writ of Error against Francis Windham upon a common Recovery had against Henry his Brother, and the Error. Case was, That Land was given in speciall tail to Thomas Henningham, father of the said Henry and the said Archur, the Remainder in generall tail (the estate tail in possession was to him and the Heirs Males of his body) Thomas had issue the said Henry and three Daughters by one woman, and the said Archur and two other sons by another woman, and dyed seised, Henry entered, and made a Feoffment, a common Recovery is had against the Feoffee, in which Henry is vouched, who vouched over the common Toucher according to the usuall course of common Recoveries, Henry dyed without issue, And Archur brought a Writ of Error being but of the halse blood to Henry; And it was resolved by the whole Court, That Error and Attaint allwayes descends to such person to whom the Land should descend: If such Recovery, as false oath had not been, As if Lands be given to one and the Heirs Females of his body, &c. and suffers an erroneous Recovery and dyeth, the heirs females shall have the Writ of Error: So upon Recovery of Lands in Borough English, for such Action descends according to the Land, quod fuit concessum per totam Curiam: But it was objected on the Defendants part: That because that the Feoffee being Tenant to the Prince is to recover in value a Fee-simple, so Henry is to yield a Fee-simple which should descend to his heirs at the common Law if this Recovery had not been, therefore he is within the law should descend, should have the Writ of Error, so he hath the loss: But the said Exception was not allowed: And it was said, That Tenant in tail upon such a Recovery, shall recover but an estate in tail, scil. such estate which he had at the time of the warranty made, &c. And afterwards Judgment was given that the Action was maintainable: So if a man hath Lands of the part of his mother, and loseth it by erroneous Judgment and dyeth; That the heir of the part of the Father shall have the Writ of Error.

Error and Attaint, by him to whom the Land is to descend.

18. Eliz. in the Kings Bench.

CCCXLVII. Foster and Pitfalls Case:

In Ejectione firmæ the Case was: Brook devised Lands to his Wife in generall Tail, the Remainder over to a stranger in Fee, and dyed, she took another Husband, and had issue a Daughter: The Husband and Wife leved a fine to a stranger: The Daughter as next Heire by 11 H. 7. entered: It was agreed by the whole Court, That an estate devised to the wife, is within the words, but not within the meaning of the Statute: Secondly, It was resolved, That no estate is within the meaning of the Statute, unless it be for the Joynture of the Wife: Thirdly Resolved, That the meaning of the Statute was, That the wife so preferred by the Husband should not prejudice the issues or heirs of her Husband, and here nothing is left in the Issues or heirs of the Husband, so as the Wife could not prejudice them, for the Remainder is limited over.

18. Eliz. In the Kings Bench.

CCCXLVIII. Greene's Case.

Acceptance of
Rent.

Entry.

Greene made a Lease for years rendering Rent with clause of Re-entry, and the rent due at the Feast of the Annunciation was behind being demanded at the day, which Rent the Lessor afterwards accepted, & afterwards entered for the condition broken, and his Entry holden lawfull, for the Rent was due before the condition broken, but if the Lessor accepts the next Quarters Rent, then he hath lost the benefit of Re-entry, for thereby he admits the Lessee to be his Tenant: And if the Lessor distrains for Rent due at the said Feast of the Annunciation after the forfeiture he cannot afterwards re-enter for the said forfeiture, for by his Distresse he hath affirmed the possession of the Lessee: So if he make an acquittance for the Rent as a Rent, contrary, if the acquittance be but for a sum of money, and not expressly for the Rent, all which, tota curia concessit.

CCCXLIX. 20. Eliz. In the common Pleas.

Entry for for-
feiture.Livory of sei-
sin.

The Case was, Lessee for life, the Remainder for life, the Remainder in tail, the Remainder in fee: The two Tenants for life make a feoffment in fee. Dyer, A woman Tenant for life in Joynure, the Remainder for life, the Remainder in fee, the Tenants for life joyne in a feoffment, the Entry of him in the Remainder in fee is lawfull by 11 H. 7. And if Tenant for life be impleaded, and he in the Remainder for life will not pay to be reserved, he in the last Remainder may, and so in our case, in as much as he in the Remainder for life was party to the wrong, he in the Remainder in tail shall enter: Which Harper and Manufon granted, i. e. Manwood, Although that this feoffment be not a disseisin to him in the Remainder in tail, yet it is a wrong in a high degree, as by Littleton, A Disseisor leaseeth for life to A who aliens in fee, the Disseisor releaseeth to the Alienee, it is a good Release, and the Disseisor shall not enter although the Alienation was to his disinherintance, Litt. 111. which Dyer granted: And if Tenant for life alieneth in fee, and the Alienee enfeoffeth his Father and dyeth, the same discent shall not abate him no more then in case of Disseisin: It hath been objected, that that is the Livory of the first Tenant for life, and the confirmation of him in the Remainder for life, Dyer was of opinion, That by this Livory the Remainder for life passeth, & this Livory shall be as well the Livory of him in the Remainder as of the Tenant in possession, & although where an estate is made lawfully by many, it shall be said the Livory of him only who lawfully may make Livory; Yet where an estate is wrongfully made it shall be accounted in Law, the Livory of all who joyn in it. And in this, the Remainder for life is extinguished by the Livory, in the feoffee, and the Livory of him in the Remainder for life shall be holden a void Livory, especially when he joyns with such a person who hath not authority to make Livory: As if the Lord and a stranger disseise the Tenant and make a feoffment over, the whole Seigniorie is extinct, as if he solely had been seised, so if he in the Reversion, and a stranger disseise for life, and make a feoffment over, the Seigniorie is gone, and yet it is the Livory of the Lessee only: And although it be but the confirmation of him in the Remainder for life, yet thereby the Remainder is gone and extinct: And afterwards Judgment was given, that he Entry of him in the Remainder in tail was lawfull: And it was said by the Lord Dyer, That if Tenant for life be the Remainder for life, the Remainder in fee, Tenant

Tenant for life, in possession alieneth in fee, that he in the Remainder in fee cannot enter, for it was not to his disinherison.

CCCL. 20. Eliz. In the Kings Bench.

The Case was; That a Capias ad Satisfaciend. was delivered to the Sheriff, and after the Sheriff did arrest the party against whom the Capias issued, by force of a Capias Ut lagatum, and then the party in the Capias came to the Sheriff, and prayed that the party remaine in Execution for his debt also, and notwithstanding that the Sheriff let the Prisoner go at large, and upon both Writts returned; Non est inventus. It was the opinion of all the Justices, That the Sheriff was not bound in point of Escape to detain the Prisoner for the Debt of the Plaintiff, and it is not like, where one is in the Fleet in Execution, there, if other condemnations in other Courts be notified to the Warden of the Fleet, he shall be chargeable with them all: It was holden also, per curiam, That if the body had been returned by Capias Ut lagatum, that the Court at the prayer of the party would grant that the Prisoner might remaine in Execution for the debt as in case of a Capias pro fine.

19. Eliz. In the common Pleas.

CCCLI. The Lord Saint John, and the Countesse
of Kents Case.

In Evidence given to the Jury in an Action of Debt brought by the Plaintiff against the Defendant: It was said by Dyer, and Manwood Justices, That if Executors grant, omnia bona sua, that the goods which they have as Executors doe not passe, which see 10 E. 4. 1. b. by Danby: But the contrary to that was holden by Wray chiefe Justice of the Kings Bench, and by Plowden, in Broadbridges case, P. 18 Eliz. and they denied the opinion of 10 E. 4. to be Law, for by such grant made by Executors, the goods of the Testator doe passe.

Grants of Executors of omnia bona sua,

CCCLII. 19. Eliz. In the common Pleas.

Note, It was said by Dyer, and Manwood Justices, That if one be condemned in an action upon the case, or Trespasse upon Nihil dicere, or murder, &c. And a Writ issueth forth to enquire of the Damages, and before the returne of it, the Defendant dyeth, that the Writ shall not abate, for the awarding of the said Writ is a Judgement: And it was said by Manwood, In a Writ of Account, the Defendant is awarded to account, if the Defendant account, and be found in arrearages and dyeth, the Writ shall not abate, but Judgement shall be given that the Plaintiff shall recover, and the Creditor shall be charged with the arrearages, and yet account doth not lye against them.

Abatement of Writ.

Account.

CCCLIII. 19. Eliz.

CCCLIII. 19. Eliz. In the Kings Bench.

Attachment
of Goods, after
the monie is
in the Sheriffs
hands, is void,

A Did recover in Debt against B. whereupon a Fieri facias issued to the Sheriffe of Devon. and the Defendant, seeing the Writ of Execution in the Sheriffes hands, said to him, that he would pay the Debt recovered at Exeter such a day, to satisfie the Execution, at which day the Defendant paid the monie accordingly, and presently came an officer of the City of Exeter, and attached the monie in the Sheriffes hands, supposing the said A. to be indebted so much to one C. in whose name he made the Attachment, and now on the behalf of the said A. a Certiorare was prayed to remove the Attachment hither, and it was therefore holden by the whole Court that the Attachment was void, and a Certiorare granted, and Wray said, If it can be proved by oath, that if the Defendant did procure, or was assenting to the said Attachment, that Proves of contempt should issue against him, and the Sheriffe demanded of the Court what return he should make, because the monies were attached in his hands, and taken from him by force, to which Wray answered, That the Sheriffe ought to answer the monies to the Plaintiffe, which were once in his hands by force of the Execution, and that it was his folly to suffer the monie to be taken from him by colour of the said Attachment, and if the monie was taken by force, the Sheriffe had his remeedy by an Action of Trespasse; for the Attachment was void, but the Sheriffe at the Return of the Writ, ought to answer for the Monie.

CCCLIV. 19. Eliz. In the Common Pleas.

Forfeiture;

Tenant for life bargained and sold his Lands to A. and his Heirs, and afterwards levied a Fine to the Bargainees, Sur comusans de droit come ceo, &c. It was holden by the Court, that it was a forfeiture committed by the Bargainees, not by the Bargainor, who at the time of the Fine had nothing to forfeit, and it was said by Manhood Justice, That if Tenant for life be disseised, and takes a Fine, or supra, of a stranger, it is a forfeiture and yet he in the Reversion hath but a right in Reversion; so that if Tenant for life be disseised, and the Disseisor commits Waste, he in the Reversion shall have an Action of Waste against Tenant for life, and if two Tenants for life be disseised by two, A. and B. and one of the Tenants for life doth release unto A. and the other Tenant for life doth reenter, he hath the Property in common with the other to whom the Release was made, and he hath reentered the intire Reversion in him, in whom the Reversion was before, &c.

CCCLV. 20. Eliz. in the Common Pleas.

Bracebridges Case.

The Case was, Thomas Bracebridge seised of a Mannour in Fee, leased a Messuage, parcell of it to one Curtes for 21 years, and afterwards 33 H.8. leased the same to one Moore for 26 years to begin after the expiration of the former Lease, and afterwards 5 E.6. he enfeoffed Griffich and others, to the use of the Feoffees themselves, and their Heirs, upon condition, That if the Feoffees did not pay to the said Thomas Bracebridge 2000 l. within 15 dayes after, that then immediately after the said 15 dayes, the Feoffees should

Should stand seised of the said Mannour to the use of the said Thomas Bracebridge, and Joyce his wife for their lives, without impeachment of Waste, and afterwards to the use of T.B. their second son in Tail, with divers Remainders over, the Feoffees do not pay the said money within the said 15 dayes, afterwards Curties attorns to the Feoffees: it was moved, if the Reversion of the Lands, passed to Curties, passeth by the Feoffment of the Mannour without attornment, which see Littleton 133, 134. 2. If by the attornment of Curties, after the 15 dayes, the uses can rise to Bracebridge and his wife, &c. and it was said, That the Case 20 H.6. Avowry 11.12. If a Mannour be granted for life, the remainder over in fee, Tenant for life dieth, if the Tenants attorn to him in the remainder, the same is good, and if a Reversion be granted to two, and one of them dieth, attornment to the survivor is good; and if a Reversion be granted to Husband and Wife, in speciall Tail, the Wife afterwards dieth without issue, Attornment to the Husband is good, and if a Reversion be given in frank marriage, and afterwards the Husband and Wife are divorced, and afterwards the particular Tenant attorns to the Wife, the same is good, and by Manwood, If a man seised of a Mannour, the demesnes of which extends into two Counties, and hath issue a Son and a Daughter by one Woman, and a Son by another woman, and dieth, the eldest Son enters into the Demesnes in one County onely, and takes the profit in one County onely, and dieth without issue, the Daughter shall have, and inherit the Demesnes or Services, whereof her brother was seised, and the Son of the half blood the rest: and by Manwood, the attornment of Curties, who was the first Lessee, shall bind Moore the second Lessee, for he ought to attorn, against whom lieth the Quid Juris clamat: and if a Lease for years be made of a Mannour, and the Reversion of it be granted to another in fee, if the Lessee for years attorneth it shall bind the Tenants of the Mannour, 19 E.1. A man seised of a Mannour, in the right of his wife, leased parcell of it for years without his wife, the Reversion thereof is not parcell of the Mannour, contrary, if the Lease had been made by the Husband and Wife: And by Dyer, if Tenant in Tail of a Mannour leaseth parcell for years, and afterwards makes a feoffment of the whole Mannour, and makes Liberty in the Demesnes not leased, the Reversion of the Land leased doth not passe, for by the feoffment a wrong is done to the Lessee, which the Law shall not further enlarge than appeareth by the deed, contrary in case of Tenant in fee of a Mannour, and that without Deed with Attornment: and it was the Case of one Keller, 25 H.8. Keller was Cestuy que use before the Statute of 27 H.8. of divers Lands by several Conveyances, the use of some being raised upon Recovery, of some upon fine, and of some upon feoffment, and he made a feoffment of all these Lands by Deed, with a Letter of Attorney to make Liberty, the Attorney entered into part of the Land, and made Liberty in the name of the whole, it was agreed by all the Justices, That the Lands passed, notwithstanding in others possession, i. other Feoffees, and by Dyer, if the Tenants of a Mannour pay their rents to the Disseisor, they may refuse again to pay them, and if a Lease be made for years, the remainder for life, if the Lessee will grant over his Reversion, the Lessee for years shall Attorn, and his attornment shall bind him in the remainder for life, and if a Lease be made to one for years, the remainder over for life, the remainder to the Lessee for years, in fee. Now if the Lessee for years grant all his interest, &c. there needs no attornment: and if Grantee of a rent in fee leaseth it for life, and afterwards grants the Reversion to another, the Attornment of the Tenant is not requisite, but onely of the Grantee for life. It was also holden, That this Attornment by Curties two years after the Liberty was sufficient, for it shall have relation to the Liberty to make it parcell of the Mannour, but not to punish the Lessee for waste done mean between the Liberty and the Attornment.

Attornment;

Kellers Case;

Relation,

tozment, but betwixt the Feoffor and Feoffee it shall passe ab initio: It was holden; also That although the uses for it limited are determined by the default of payment within the 15 dayes, yet the Feoffers shall take the Reversion by this Attornment to the second uses, and if I enfeoff one upon condition to enfeoffe J.S. who refuseth, now the Feoffee shall be seised to my use, but if the condition were to give in Tail, contrary: So here is a Limitation beyond the first use, which shall not be defeated for want of attornment to the first uses, and here it was not the meaning of Bracebridge to have the Lands again upon breach of the condition in his former estate, but according to the second use, and Judgement was given in the principal case according to the resolutions of the Judges, as aforesaid, and it was said by Harper Justice, That if a feoffment in Fee be made to J.S. upon condition that he shall grant to A. a rent-charge, who refuseth it, J.S. shall be seised to his own use.

CCCLVI. 20 Eliz. In the Common Pleas.

The Case was this, Lord and Tenant by service to pay every year such a quantity of salt, but since 10 H. 7. The Tenant hath alwayes paid the monie for salt, the question was, If the Lord might resort to the first service, and if the monie be Seisin of the salt, and Manwood took this difference, i.e. where the Lord takes a certain sum of monie for the salt, the same is not any Seisin, for the service is altered, as at the first *Botage* Tenure was a work to be done by labour, i.e. plowing, but now it is changed into a certain Rent, and the Lord cannot resort to have his plowing, and in Kent others Tenants in ancient time have paid Barly for their Rent, but the same afterwards was paid in a certain sum of monie, so as now the Lord of Canterbury, who is Lord of such Tenements cannot now demand his Barly: &c. but if the sum which hath been used to be paid be incertain one year so much, and another year so much, according to the price of salt, then such a payment of monie is a sufficient Seisin of the salt, *Quod fuit concessum per Curiam*,

CCCLVII. 20 Eliz. In the Common Pleas.

Accompt, brought by an Heir Copyholder, for the profits of his Copyhold Lands taken during his *Botage*, the Defendant pleaded, That by the Custom of the said *Manor*, the Lord of the *Manor* might assign one to take the profits of a Copyhold descended to an Infant, during his *Botage* to the use of the Assignee, without rendering an accompt, and the same was holden to be a good Custom, as a Rent granted to one and his Heirs to cease during the *Botage* of every Heir, but admitting, that the Customs were hold, yet this Action doth not lie, for the Defendant hath not entered and taken the profits, as *Prochein amy*, in which Case although he was not *Prochein amy*, &c. he is chargeable, as *Prochein amy* according to his Claim, but here he claimeth by the custom and grant of the Lord, and not in the right of the Heir, and therefore it was adjudged in this time of this Quare, that if one entred into Lands claiming by Devis, where in truth the Land devised is entailed, he should not be charged in accompt, &c.

Accompt by
the heir of a
Copyholder.

Custom.

CCCLVIII. 20. Eliz. In the common Pleas.

N Dc, It was holden by the whole Court, That the Statute of 32. & 34 H. 8. of Wills, did not extend to Lands in London, but that the devise of the whole is good: And if Houses in London parcell of the possessions of Abbeyes came to the Crowne by Dissolution, and he grants them over to hold in cheife by Knights service, these Lands are devisable: But it was holden, That the said Statutes as Aes executed, extended to Lands in London, and shall be good but for two parts: And if a man hath Lands in tail, and in fee-simple, which are of double the value of the Lands in tail, and deviseth all his Lands, all the Land in fee-simple shall passe. Dyer. One seised of three Mannors, the one in Capite in fee, and two in Socage in tail, and deviseth all his Land in Capite, it is good against the King for all Capite Land, and he shall be tyed to have the Lands in Socage, but it shall not bind the Heir: And a devise of the third part (where all is devised) is void as well against the Heir as against the King. And he said, That if a man be seised of twenty Acres in Socage, and ten Acres in Capite, and deviseth two parts of his Lands, it is reasonable to say, That all the Socage Lands shall passe, but if the devise was of two parts of all his Lands, is otherwise, for this word (All) implies that the two parts shall be, per my & per tout, as well Capite as Socage, i. e. It was argued by Fenner, That the Lands in London are now devisable as they were before the Statute, for if the Devisee of Lands in London be disturbed, he shall have, Ex gravi Querela, otherwise it is of Lands at the common Law, and if an Assize of Mort-dancester be brought of Lands in London, it is a good Plea to say, That the Lands are devisable: but in an Assize of Mort-dancester of Lands at the common Law, it is not any Plea: And if a man gives Lands at the common Law, i. e. not devisable by the common Law, he cannot devise the Reversion, for the Statute shall not doe wrong to the person, i. e. to the Donee who there shall lose his acquittall: but of Lands devisable by custome, it is otherwise, and if Land in a Burrough was devisable for life by the Custome, and afterwards came the Statute of 23 H. 8. which made all Lands devisable, now that Land is devisable for life by the Custome, and the Reversion by the Statute.

Exposition of
Statute, of 32.
and 34. Of
Wills.

Custome of
London.

CCCLIX. 0. 21. Eliz. In the common Pleas.

I f an Action of Waste, of Waste assigned in a Wood, the Jury viewed the Wood only without entring into it: And it was holden that the same was sufficient, for otherwise it should be tedious for the Jury to have had the view of every Rub of a Tree which had been felled: Pet Meade Justice said, That if Waste be assigned in severall corners of the Wood, then the Jury is to have the view of every corner, but contrary where Waste is assigned in the whole Wood: And if Waste be assigned in every Room of a House, the view of the House generally is sufficient. And Dyer Justice said, That if Waste be assigned in severall places, and of some of them the Jury had not the view, of that they may find, no Waste done.

Waste.

View.

29 Eliz. In the common Pleas.

CCCLX. *Sir Thomas Lees Case.*

Election.

It was holden, per curiam: That whereas Sir Thomas Lee was seised of a Mannor, and alien the Mannor except one close parcell of the said Mannor called Newdick, and there were two Closes parcell of the said Mannor called Newdick, the one containing nine Acres, and the other containing three Acres; That the Aliene should not chose which of the said closes he would have: But the Aliene, or Heirs, should have the Election which of the said Closes should passe.

CCCLXI. 20. Eliz. In the common Pleas.

Fines levied
by Tenant in
tail in Re-
mainder.

Tenant in tail, the Remainder in tail, &c. Tenant in tail, in possession, makes a Lease for three lives, according to the Statute of 32 H. 8. and afterwards dyeth without issue, he in the Remainder before any Entry taketh a Fine, the same is good, for by the death of Tenant in tail without issue, the Free hold is vested in him in the Remainder in tail: And of that opinion was the whole Court.

20. Eliz. in the common Pleas.

CCCLXH. *Ferrand and Ramseys Case.*

In an Ejectione firmæ brought of a House in London, the Defendant pleads, That long time before the Death of the Plaintiff had any thing, &c. One Ann Ramsey was seised in fee, and dyed seised, and that the same descended to William Ramsey as Son and Heir to the said Ann, who was himself so by Israel Owen, who leased to the Plaintiff, upon whom the said William Ramsey did re-asser: The Plaintiff Replicando, That the said Ann did not die seised, but, That before the Death of one Robert Owen was seised and dyed seised, and from him descended the said House to Israel Owen as Son and Heir of the said Robert, absque hoc, that the said Israel did devise the said Ann, upon which they were at issue, and at Nisi prius, in London it was given in Evidence of the Defendants part: That Croston and Langhton were seised in fee of the said Messuage, and by Deed indented conveyed it to one John Ramsey, Robert Dakins, and four others and their Heirs, upon condition that they the said Feoffees their Heirs or Assignes should pay to the said Ann and her Heirs six pounds thirteen shillings and four pence: And also should enfeoff the said Ann, if to the same they were required by the said Ann in her life, or within four dayes next following such Request in fee unto the use of the said Ann and her Heirs, cum & quando ad hoc per eandem Annam requisit, fuerint, and if the said Ann dyed before such Request, that then the said Feoffees or their Heirs should enfeoff such issues of the said Ann, or such other persons which the said Ann should name, cum & quando ad hoc per eandem Annam, requisit, fuerint, or within four dayes after such Request the said Feoffees or their Heirs should be seised of the said House, to the use of the said Ann and her Heirs. Afterwards the seventh of Aprill, 16 Eliz. Ann demanded of William Ramsey, Son and Heir of John Ramsey, six pounds thirteen shillings and four pence, being due to the said Ann, ut supra, the which summe the said William Ramsey did refuse to pay, by force of which, and by the

the Statute of 27 H. 8. The said Ann Ramsey was thereof seised, and dyed seised, and from her descended the said House to William Ramsey: The plaintiff confessed the feoffment to Croiton and Langhton, to John Ramsey and others, and shewed further, That the said Ann required surviving feoffees to enfeof one Robert Owen of the said House, who three dayes after made the feoffment accordingly, Robert Owen enfeofed John Owen, who dyed thereof seised, and from him the said House descended to Israel Owen, Craiton dyed, Langhton having issue two Daughters, dyed: All the feoffees but one dyed, And the time aforesaid demanded the said six pounds thirteen shillings and four pence of the said William Ramsey in another House in London, due at the Feast of Saint Michael last before, who denyed to pay it, the second Daughter of Langhton entred, and thereof enfeofed the said Israel Owen, who leased the same to the Plaintiff, and upon that Evidence the Defendant did demur in Law: And first it was resolved by the whole Court, That the said summe to be paid to the said Ann was not a Rent but a summe in grosse, because referred to a stranger, &c. Which see Litt. 79. And by Maunson Justice, If the words of the reservation had been twenty Nobles Rent, yet it had been but a summe in grosse, but otherwise it had been by her wife: Also there is not any condition for the payment of it, but only a Limitation for the word subsequent, which Limits the future use, takes away all the force of the words of the Condition, as 27 H. 8. 24. Land given in tail upon condition that the Donor and his Heirs shall carry the Standard of the Donor when he goes to battaille, and if he faile thereof, then the same to remaine to a stranger, the limiting of the Remainder hath taken away the conditions and hath controlled it, and now the condition is become a Limitation: But where the words subsequent are against Law, as if upon failer, that then it shall be lawful for a stranger to enter, &c. these words because they are against Law (for a Rent cannot be referred to a stranger, &c.) do not destroy the Condition by Mead, contrary by Maunson, for the Condition is utterly gone. And by Mead, feoffment in fee upon condition, That if the feoffee shall doe such a thing that he shall re-enter and retain the Land to the use of a stranger, the use is void, and the feoffee shall hold the Land to his own use: A feoffment in fee upon condition, That the feoffee shall marry my Daughter, and if he refuse to marry her, that then he shall be seised to the use of I S, the same is not a Condition, but a Limitation, and in all cases where, afterwards, of a Condition, an Interest is limited to a stranger, there it is not a Condition but a Limitation: And Meade said, That the said annuall summe is not demandable, but the party ought to pay it at his peril, Litt. 80. But by Maunson, it ought to be demanded, for so this word (Refuse) doth imply: And when at the Request of Ann the feoffment is made, by Maunson Meade, and Windham, the Rent is gone, but Dyer contrary, unless the feoffment be made to Ann her selfe: And afterwards Judgment was given for the Plaintiff, Hill, 19 Eliz. Rot. 748. There was a Case between Shaw and Norton. One Green devised his Lands to A, and devised also, the said A should pay a Rent to B, and that B might distraine for it, and if A faile of the payment of it, that the Heires of the Devisor might enter, the same is a good Distresse, and a good Condition. And by Maunson, Demand ought to be made of the Rent, for the words are (Refuse) which cannot be without Demand or Request: As it was certified, That such a Clerk refused to pay his Tenths, and because it was expressly set downe in the certificate that he was requested, &c. for that cause he was discharged. And it was also holden, That if Request be necessary, that in this case, Request is to be made, That it ought to be made to the surviving feoffees, or his heire, and not to the heires of any of the feoffees who are dead,

Rents.

Reversion.

Feoffments upon condition.

Regula.

Shaw and Norton's Case.

Hill 25. Eliz. In the Kings Bench.

CCCLXIII. Lacyes Case.

Indictments.

Commission
repealed.

Lacy was indicted of the death of a man upon Scarborough sands, in the County of York, between the high water, work, and the low water, work, and the same Indictment was removed into the Kings Bench, and being arraigned upon it, he shewed, that the said Indictment was shewed, by vertue of a Commission which issued the first day of May, directed to the Justices of Assize, and other Justices of the Peace in the said County, to enquire of all Murders, Felonies, &c. and pleaded further, That the second day of May aforesaid, issued another Commission directed to the Lord Admirall and others upon the Statute of 28 H.8. cap. 15. by force of which the said Lacy was indicted of the same murder, whereof he was now arraigned, and the said last Commission was, ad inquirendam, tam super altum mare, quam super lictus maris, & ubicunque locorum infra jurisdictionem nostram maritimam: And that the said Indictment taken before the Admirall, was taken before this, upon which he was arraigned, and upon the whole matter prayed to be dismissed: And the opinion of all the Justices was, that the first Commission was repealed by the second, and so the Indictment upon which hee was arraigned, taken, coram non Judge, 10 E. 4. 7. If a Commission for the Peace issueth into one County, and afterwards another Commission issueth to a Town within the same County and parcell of it, the first Commission is repealed, which Gawdy granted, if notice be given, &c. but Wray denied it; but by the whole Court, by this last Commission to the Lord Admirall, the first Commission, as to the Jurisdiction, in locis maritimis is determined and repealed; for these two Commissions, are in respect of two severall authorities, the first Commission merely by the Common Law, the other by the Statute aforesaid, and thereupon the party was discharged against the Queen, as to that Indictment. Note, that in the Argument of this Case, it was said by Coke, and agreed by Wray, That if a man be struck upon the high-sea, whereof he dieth in another County afterwards, that this murder is dispunishable, notwithstanding the Statute of 2 Ed. 6.

Pasch. 25 Eliz. In the Kings Bench.

CCCLXIV. The Queen and Braybrookes Case.

The Queen brought a Writ of Error against Braybrook, The Case was this, That King Ed. 4. was seized of the Manor of Merston, and gave the same to Lionel Lord Norris, and A. M. and the Heirs of the body of the Lord, the Remainder to H. Norris in Tail, L. and A. entermarrie, L. suffered a common Recoverye against himself onely, without naming the said A. Hen. Norris is attainted of high Treason by Act of Parliament, and by the same Act all his Lands, Tenements, Hereditaments, Rights, Conditions, &c. the day of the Treason committed, or ever after, &c. Hen. Norris is executed, Lionel dieth without issue, the Queen satisfied the said Recoverye for one moiety by Scire facias, because Anne who was joint-tenant with Lionel who was not named, and party to the said Recoverye: and afterwards the Queen granted to the Lord Norris, Son of the said Hen. Norris, Manerium suum de Merston, & omnia jura sua in eodem, and now upon the said Recoverye, the Queen brought a Writ of Error, and it was argued by Egerton the Queens Solicitor, that this right to a Writ of Error is such a right as is transferred to the Queen by the Act of Parliament, for the words are, omnia jura sua quocunque, and here is a right, although not a present right

right, yet a right although in futuro, so it is a right of some quality, as A. Tenant in Tail, the Remainder in Tail to B. A. makes a Feoffment in Fee, B. is attainted of high Treason, and by such Act all his Lands, &c. given to the King. A. dieth without issue, the Queen shall have a Forfeiture in the Remainder, and although the Queen hath granted to the Lord Norris, Manerium suum de Merston, & omnia jura in eodem, yet by such generall words, a Writ of Error doth not passe, which See 32 H.8. br. Patents 98. And also this Acton rests in privacy of record, and cannot be displaced from thence, but by Act of Parliament, see Br. Chose in Action 14. 33 H.8. for when the King will grant a thing in Action, he ought in his Patent to recite all the circumstances of the matter, as the Right, and how it became a Right, and because the Queen here doth not make mention of this Right, as of the Entail, the Recovery, and the Attainder; for that cause the Right doth not passe. The Case betwixt Cromer and Cranmer, 8 Eliz. the Disseisor was attainted of Treason, the Queen granted to the Heir of the Disseisor all the Right which came unto her by the Attainder of his Ancestors, nothing passed Causa qua supra: And always where the King grants any thing, which he cannot grant, but as King, that such a grant without speciall words, is to no purpose. Coke contrary, & he agreed the Case put by Egerton, for at the time of the Attainder, B had a Right of Remainder, but in our Case Hen. Norris had not any Right, but a possibility of a Right of Action, i.e. a Writ of Error; And he said that this writ of Error is not forfeitable (for it is an Action which rests in privacy) no more than a condition in grosse, as a Feoffment in Fee is made upon condition of the party of the Feoffor who is attainted ut supra: This word (Right) in the Act of Attainder shall not transfer this Condition to the Queen, and of the Act of Attainder to Hen. Norris, it is to be conceived That the makers of the Act did not intend, that by the word (Right) every Right of any manner, or quality whatsoever should passe to carry a Condition to the Queen, and therefore we ought to conceive, that the makers of the Act did not intend to touch Rights which rested in privacy: and as to the Grant of the Queen, to the Lord Norris of the Mannor of Merston, Et omnia jura sua in eodem, he conceived, that thereby the Right of the Writ of Error did passe; for it is not like Cranmers Case, but if in the said Case, the Land it self had been set down in the Grant, it had been good enough, as that Cranmer being seized in Fee of the Mannor of D was thereof disseised, and so being disseised was attainted of high Treason: now the Queen grants to his Heir totum jus suum in his Mannor of D, &c. and so in our Case, the Queen hath granted to the Lord Norris, Manerium suum de Merston, & omnia jura sua in eodem, &c. at another day it was moved by Plowden, that this Right of Writ of Error was not transferred to the Queen by the Act, but such Right might be saved to a stranger, &c. the words of the Act are, omnia jura sua, and this word (sua) is Pronomen possessionis, by which it is to be conceived, that no Right should passe, but that which was a present Right, as a Right in possession, but this Right to a Writ of Error, was not in Hen. Norris at the time of his Attainder, but it was wholly in him against whom the erroneous Judgement was had: and therefore if in a Præcipe quod reddat, the Defendant doth and loseth, and Judgement is given, and before Execution, the Tenant is attainted by Act of Parliament, by words ut supra, and afterwards he is pardoned, the Demandant suey for Execution against the Tenant, notwithstanding this Attainder, the Tenant may sue Execution against the Voucher, and afterwards Wray chief Justice openly declared in Court, the opinion of himself and all his companion Justices, and also of all the other Justices to be, That by this Act of Parliament, by which all Lands, Tenements, Hereditaments, and all Rights of any manner and quality whatsoever Hen. Norris had, the day of his attainder, or ever after, Lionel then being alive, and over-riding the said Hen. Nor-

ris, that this Writ of Error was not transferred to the Queen : And that the said Act by the words aforesaid could not convey to the King this possibility of right, for at the time of the Attainder, the Right of the Writ of Error was in Lyonel and Hen. During the estate tail limited to Lyonell, had not to do with the Land, nor any matter concerning it : And Judgement was given accordingly ; And it was holden, That he in the Reversion, or Remainder upon an Estate tail might have a Writ of Error by the common Law, upon a Recovery had against Tenant in tail, in Reversion.

CCCLXV. Mich. 25, & 26. Eliz. In the common Pleas.

Copy-holder.

In Trespasse brought by a Copy-holder against the Lord for cutting down Land carrying away his Trees, &c. It was found by special Verdict, That the place where, &c. was Customary lands of the Plaintiffs, holden of the Defendant, and that the Trees whereof, &c. were Cherry Trees, de magnitudine sufficienti essendi maremum, and that the place where they growed, was neither Orchard, nor Garden : It was said by the Court, That by the Custom the Copy-holder could not cut down such Trees, but the Lord might, and that the cutting down of such Trees which were not Wast, the Copy-holder might justify without punishment : But because by the Verdict it did not appear that the Trees for which the Action was brought, were Timber in fact, but only, de magnitudine essendi maremum, the Plaintiff had Judgement.

Mich. 25, & 26. Eliz. in the Common Pleas.

CCCLXVI. The Lord Staffords Case.

Extent.

Upon Recovery in debt against the Lord Stafford, certain Lands of the Lord were extended by Elegit ; The Queen because the Lord Stafford was indebted unto her, by Prerogative ousted the Tenant by Elegit : Fleetwood Serjeant moved the Court in the behalfe of him who recovered, and furnished to the Court that the Queen was satisfied, and therefore prayed a Revertent, but the Court would not grant it, because they were not certain of the matter, but advised the party to sue a Scire facias against the said Lord Stafford, to know and shew cause, why a Revertent should not issue forth, the Queen being satisfied, &c.

Mich. 25, & 26. Eliz. In the Kings Bench.

CCCLXVII. Gibbs and Rowlies Case.

Tythes.

Prohibition.

Symon Gibbs Parson of Beddington, Libelled in the Spirituall Court against Rowlie, for Tythe of the Plike, Rowlie upon surmise of a Prescription, de modo Decimandi, obtained a Prohibition, which was against Symon Gibbs, Rectorem Ecclesie parochial, de Nether Beddington, and the parties were at Issue upon the Prescription, and it was found for Rowlie. Egerton Solicitor moved against the Prohibition, because the Libell is against Gibbs, Rectorem Ecclesie paroch. de Beddington, and the Prohibition was, de Nether Beddington, and it was not averred that Beddington in the Libell, and Nether Beddington, is unum & idem, & non diversa ; It was said by the Court, That upon the matter there is not any Prohibition against Rectorem Ecclesie de Beddington

Beddington only, and therefore said to the Plaintiffs Councell, let the Parson proceed in the Spirituall Court at his perill.

Mich. 25. & 26. Eliz. In the Kings Bench.

CCCLXVIII. *Russell and Handfords Case.*

Russell brought an Action upon the Case against Handford, and declared, Quod cum quoddam molendinum ab antiquo fuit erectum, upon such a River, de quo, one Thomas Russell whose Heir the Plaintiff is, was seised in his Demesne of Fee, and dyed thereof seised, after whose death the same descended to the Plaintiff. by force of which the Plaintiff was seised in his Demesne as of Fee, and so seised, The Defendant upon the same River had leyed a new Mill, per quod cursus aquarum prædict. coarctatus est, and upon that guilty, It was found for the Plaintiff: It was moved in Arrest of Judgement, That it is not layed in the Declaration, that his Mill had been a Mill time out of mind, &c. And then if it be not an ancient Mill time out of mind, &c. it was lawfull for the Defendant to erect a new Mill; And it was said, That these words (ab antiquo) are not fit or significant words to set forth a Prescription, but the words, A tempore cujus contrarii memoria hominum non existat. are the usuall words for such a purpose: See the Book of Entries 10, 11. See 11 H. 4. 200. If I have a Mill and another leyves another Mill there, and the Miller hinders the Water to run to my Mill, doth any such Nuisance, an Action lyeth without any Prescription, as it seems by the Book in 22 H. 6. 14. The Plaintiff declared, That he was Lord of such a Towne, and that he and all his Predecessors, Priors of N, Lords of the same Towne, have had, within the same Towne, four Mills time out of mind, &c. And that no other person had had any Mill in the said Towne, but the Plaintiff and his Predecessors, the said four Mills, and that all the Tenants of the Plaintiff within the same Towne, and all other Residents there, &c. ought, and time out of mind, &c. had used to grind at the said Mills of the Plaintiff, and that the Defendant, one of the Tenants of the Plaintiff, had erected and set up a Horse Mill within the said Towne, and there the Residents grinded, &c. And it was holden, That peradventure upon such matter an Action lyeth, because the Defendant being one of the Tenants of the Plaintiff is bound by the Custome and Prescription, so as he hath offended against the privy of the Custome and Prescription. And as to the Case in question, It was the opinion of all the Justices, That if the Mill wherof the Plaintiff hath declared, be not an Amercement Mill, that this Action doth not lye upon the matter, eo quod cursus aquarum coarctatur: But yet at last, it was holden by the Court to be good enough, notwithstanding the Exception, another Exception was taken to the Declaration, because that here is set forth the seisin of the Father of the Plaintiff, and the Descent to the Plaintiff by force of which he was seised in his Demesne, &c. without shewing that after the death of the Father that he entered into the said Mill, &c. so as no seisin in fact is alleadged, but only a seisin in Law, and if the Plaintiff was not seised in fact, he cannot punish this personall wrong, but the Exception was disallowed, for such a seisin in Law is sufficient for the maintenance of this Action. And afterwards the Plaintiff had Judgement to recover his Damages. See for the Action it selfe contained in the Declaration. 8 Eliz. Dyer 248.

Nuisance.

Words of Prescription.

Seisin in fact, and in Law.

Mich. 26. Eliz. In the Exchequer.

CCCLXIX. Cleypools Case.

Information in the Exchequer against Cleypool, upon the Statute of Tillage, 5 Eliz. setting forth, That the Defendant hath converted three hundred Acres of arable Lands of Tillage, to pasture, and the same conversion hath continued from 15 Eliz. unto the two and twentieth of Eliz: The Defendant as to the Conversion pleaded Not guilty, and as to the Continuance, the general pardon by Parliament, 23 Eliz. upon which the Attorney general did demur in Law. It was argued, That that pardon did not extend to the continuance of the said Conversion: And first the Barons were of clear opinion, That if A be seised of Arable Lands, and converts the same to pasture, and so converted, leaseth it to B, who continues it in pasture as he found it, he shall be charged by that Statute: And it is not any good Construction, where the Exception in the pardon is, excepting the converting of any Land from Tillage to Pasture, made, done, committed, or permitted, that the Conversion excepted out of the pardon shall be intended and construed the bare Act of Conversion, but the whole offence, i. the continuance and practise of it is understood: As if by general pardon all intrusions are excepted, now by that, the instant Act of Intrusion, i. the bare Entry is not only excepted, but also the continuance of the Intrusion, and the perception of the profits: And note, The words of the Statute are (Conversion permitted) and Conversion continued is Conversion permitted: And the said Statute doth not punish the Conversion, but also the continuance of the Conversion, for the penalty is appointed for each year in which the Conversion continues: And Egerton Solicitor put this Case, 11 H. 8. It was enacted by 3 H. 7. cap. 11. That upon Recovery in Debt, if the Defendant in delay of Execution fines a Writ of Error, and the Judgement be affirmed, he shall pay damages, now the case was, That one in Execution brought such a Writ of Error, and the first Judgement is affirmed, he shall pay damages, and yet here is not any delay of the Execution, for the Defendant was in Execution before, but here is an Interruption of the Execution, and the Statute did intend the Execution it selfe, i. the continuance in Execution, *ibidem* moraturus quousque: It was said on the other side; That the conversion and continuance thereof are two severall things, each by it selfe, and so the conversion only being excepted in the pardon, the continuance thereof remaines in the grace of the pardon: And it appeareth by the Statute of 2, and 3. Ph. & Ma. That conversion, and continuance are not the same, but alia, atque, diversa, and distinct things in the consideration of the Law, for there it is enacted, That if any person shall have any Lands to be holden in Tillage according to the said Statute, but converted to Pasture by any other person, the Commissioners, &c. have authority by the said Statute to enjoin such persons to convert such Lands to Tillage againe, &c. And in all Cases in the Law, there is a great difference betwixt the beginning of a wrong, and the continuance of it: As if the Father levyeth a Ransome in his own Lands to the offence of another and dyeth: An Assise of Ransome doth not lye against the Heir for the continuance of that wrong, but a Quod permittat, See F. N. B. 124. It was adjomed.

Mich.

Mich. 26. Eliz. in the Kings Bench.

CCCLXX. Powley and Siers Case. and Inquaintance

Powley brought Debt against Sier Executor of the Will of A: The Defendant demanded Judgement of the Will, for he said, That one B was Executor of the said A, and that the said B did constitute the Defendant his Executor, so the Will ought to be brought against the Defendant as Executor of the Executor, and not as immediate Executor to the said A, the Plaintiff by Reply said, That the said B before any probate of the Will, or any Administration dyed, and so maintained his Will: Wray Justice was against the Will, for although here be not any probate of the Will of A, or any other Administration, yet when B made his Will, and the Defendant his Executor, the same is a good acceptance in Law of the Administration and execution of the first Will, for the Defendant might have an Action of Debt due to the first Testator: Gawdy and Ayliff Justices, The Will is good: Dec Dyer, 23 Eliz. 372, against Wray.

Debt.

CCCLXXI. Pasch. 26. Eliz. In the Kings Bench.

The Case was: A leased of certain Lands, bargained and sold by Indenture all the Trees there growing, Habendum, succidendum, & exportandum, within twenty years after the date of the said Indenture, the twenty years expire: The Bargaineer cuts down the Trees, A brought an Action of Trespass for cutting down the Trees: And by Wray Justice, The mere property of the Trees vests in the Bargaineer, and the Limitation of time which cometh after is not to any purpose but to hasten the cutting of the Trees within a certain time, within which, if the Lessee doth not cut them, hee should be punished as a Trespasser as to the Land, but not as to the Trees: Gawdy contrary; And that upon this Contract, a conditionall property vests in the Lessee, which ought to be pursued according to the direction of the condition, and because the condition is broken, the property of the Trees is vested in A.

Bargaine and
sale of Trees.

Pasch. 26. Eliz. In the Kings Bench.

CCCLXXII. Curriton, and Gadbarys Case.

In an Action upon the Case, the Plaintiff declared, That the Defendant in consideration that the Plaintiff should make a lease for life to the Defendant of certain Lands, Habendum after the death of A, before the tenth of August next following, promised to pay to the Plaintiff ten pounds, the first day of May next after the promise which was before the tenth of August: And the truth was, That the said ten pounds was not paid at the day, or supra, nor the said Lease made: And now both sides being in default, the Plaintiff brought the Action: It was said by Wray Justice, If the Plaintiff had made the Lease according to the consideration, and in performance thereof the action would have lyen, but now his own default had barred him of the Action: But for another cause, the Declaration was holden insufficient, for here is not any Consideration, for the promise is, in consideration that the Plaintiff shall lease to the Defendant for life, Habendum after the death of A, which cannot be good by way of lease, but ought to enure by way of grant of the Reversion, so as here is no lease, therefore no consideration, and notwithstanding

Leases.

that if a Lease be made for life, Habendum after the death of A, the Habendum is void, and the Lease shall be in possession according to the Premises, yet the Law will not give such construction to the words of a Promise, Contract, or Assumpfit, but all the words ought to be wholly respected according to the Letter, so as because that no lease can be made according to the words of the Consideration, no supply thereof shall be by any favorable construction: And so it was adjudged: But before the same Imperfection was espyed, Judgment was entered, and therefore, the Court awarded that there should be a cessat executio, entered upon the Roll, for it is hard as it was said by Wray to write the party to a writ of Error in Parliament, because Parliaments are not now so frequently holden as they have used to be holden, and the Execution was staid accordingly.

Pasch. 26 Eliz. In the Kings Bench.

CCCLXXIII. Willis and Crosbys Case.

Error.

Amercement.

In a writ of Error, It was assigned for Error, That whereas in the first Action, the parties were at Issue, and upon the Venire facias one Gregory Tompson was returned; But upon the Habeas Corpora, George Tompson was returned, and the Jury was taken, and found for the Plaintiff, and Judgment given accordingly; It was argued on the part of the Plaintiff in the first Action, that the same is a thing amendable: As 9 E. 4. 14. A Jury was impanelled by the name of I B, and in the Habeas Corpora he was named W B, and by such name sworn, &c. And upon Examination of the Sheriff, it was found that he was the same person who was impanelled, and it was amended and made according to the Pannell; But the opinion of the whole Court was, That as this case is it was not amendable, and it is not like to the case of 9 E. 4. For there the Examination was before the Verdict taken the Sheriff was in Court, but here it is after Verdict, and the Sheriff is out of Court, and cannot be examined, and for these causes, the Judgment was reversed.

Pasch. 26. Eliz. In the Exchequer.

CCCLXXIV. Ognell and the Sheriffs of Londons Case.

Escape.

Ognell brought Debt upon an Escape by Bill in the Exchequer against the Sheriffs of London, the Case was, That one Crofts was bound to the now Plaintiff in a Recognizance, and afterwards committed for Felony to the Prison of Newgate, of which he was attainted, and remained in Prison in the custody of the Sheriffs: Afterwards Ognell sued a Scire facias upon the said Recognizance against Crofts, the Sheriffs returned, Capi, and the especial matter aforesaid, and after Judgment given against Crofts for Ognell, Crofts got his pardon, and escaped: It was argued, That notwithstanding this Attainder, Crofts is subject to the Execution obtained upon the Recognizance: See the case of escape betwixt Maunser and Annesley, 16 Eliz. in Bendloes case, 2 E. 4. 1. It is said by Watman, That a man outlawed for Felony shall answer, but shall not be answered: See 6 E. 4. 4. One condemned in Reddissin, was taken by a Capias pro fine, and committed to Prison, and afterwards outlawed of Felony, the King pardons the felony, yet he shall remain in Execution, for the party if he will; But if the party be once in Execution for the party, & then outlawed of Felony, it seems by 6 E. 4. Fitz. Execution, 13. that the Execution is gone. And all the Barons were clear of opinion

In the principall case for the Plaintiff. And they also said, That if one who hath a Protection from the King, be taken in Execution, & Escape, the Gaoler shall answer for the Escape, and that was one Hales Case, And afterwards Judgment was given for the Plaintiff, and one of the causes of the Judgment was, because, That the Sheriffs had returned, Cepi. upon the Proces.

Hales case.

Hill. 25. Eliz. In the Kings Bench.

CCCLXXV. Bishop and Redmans Case.

Bishop, a Doctor of the Civill Law brought an Action of Covenant against Redman Archdeacon of Canterbury, and declared upon an Indenture, by which the Defendant did constitute the Plaintiffe Officiale suam of his Archdeaconry for three years, and gave to him by the said Indenture, auctoritatem admittendi, & inducendi quoscunque Clericos ad quecunque beneficia Ecclesiastica infra Archidiaconatum predict. and also Probate of Wills, and further granted to him omnem & omnimodam Archidiaconatum jurisdictionem suam predict. absque impetitione, denegatione, restrictione, &c. after which Doctor Young was created Bishop of Rochester, which is in the Jurisdiction of the said Archdeaconry, and the Defendant took upon him to enthrone the said Bishop in his said Church, and took of him for his fee twenty Nobles, whereupon the Plaintiff brought this Action, it was moved for the Defendant, that upon the matter the Action doth not lie; for the Office of enthroning or installing of a Bishop doth not passe by the said Indenture, nor is there any word in the Indenture, that doth extend unto it, for the Bishop is not a Clark, and the Plaintiffe by the Indenture hath not to do with clarks, not with Bishops, and it appeareth by the Grant of Subsidies, by the Clergy in Parliament, that a Bishop and a Clark are distinct things, See Instrumentum heretof. Prelatus et Clericus, &c. Also the Plaintiffe hath not to do with a Bishoppick, but with Benefices, and a Bishoppick is not a Benefice, but a higher thing: And further the Plaintiffe hath power to admit and induct, which doth not extend to installing, or enthronization, for that belongs to a Bishop, and the Court was clear of opinion, That by this Grant there did not passe any power to install or inthrone Bishops; and the generall words, i.e. omnem & omnimodam jurisdictionem Archidiaconatum predictam, did not mend the matter, for the words (predictam) doth restrain the words omnem, & omnimodam, &c. but admitting that; It was moved, If upon this Indenture Covenant lieth, for there is not any expresse Covenant, yet the words absque impetitione, denegatione, restrictione, do amount to so much. to make the Defendant subject to his Action, if the matter in it self would have served for him, and so was the opinion of the Court.

VWords which amount to Covenant.

Hill. 26 Eliz. In the Kings Bench.

CCCLXXVI. Lady Lodges Case.

The Lady Laxton of London by her will bequeathed to Matthew Luddington, and Andrew Luddington, severall Legacies in monies to be paid to them respectively at their severall ages, &c. and made the Lady Lodge her Daughter her Executrix and died, Andrew died before his full age, Matthew took Letters of Administration of the goods of Andrew, and sued the Lady Lodge in the Spirituall Court for the Legacy bequeathed to Andrew; before which

Prohibition.

which Suit begins, the Lady Lodge, with Sir Thomas her Husband, gave all the goods which he had as Executor of the said Lady Laxton to Sir William Coxwell, *Bar.* of the Rolls, and to William Lodge, *Honne* of the said Sir Thomas and his Lady, depending which Suit the Lady Lodge died, after which sentence was given against her being dead, and now a Citation was out of the Spirituall Court against William Lodge Executor of the said Lady Lodge, to shew cause why the sentence given against the said Lady Lodge, should not be put in Execution against him, and sentence was given against the said William Lodge who appealed to the Delegates, and there the sentence was affirmed; And now came William Lodge into the Kings Bench, and set forth the grant of the said Lady Lodge as aforesaid, and that the same was not examinable in the Spirituall Court, and thereupon prayed a Prohibition: And Awdrey Doctor of the Civill Law, came into Court to informe the Justices, what their Law was in certain points touching the Case in question; and as to the sentence given against the Lady Lodge, after her death he said, That if the Defendant dyed before Issue joyned, which is called Litis contestationem, the suit shall cease, but if he dyeth after, Litis contestationem, it is otherwise, for in such case the suit shall proceed, for after Litis contestationem, the right of the suit is so vested in the Doctor, that he is a person suable untill the end of the suit: And also he reported their Law to be, That if a Legacy be bequeathed to an Infant to be paid when he shall come to the age of twenty one years, if such a Legatory dyeth before such age, yet the Executor or Administrator of such Legatory, shall sue for the said Legacy presently, and shall not expect untill the time, in which if the Infant had continued in life, he had attained his full age. And as to the Prohibition it was argued by Egerton Solicitor General, That the grant aforesaid is not tryable in the Spirituall Court: As if the said Lady Lodge had suffered a Recovery to be had against her as Executor by Cobin, &c. the same is not examinable in the Spirituall Court, but belongs to temporall Consuls, and therefore he prayed a Prohibition: But on the other side it was said, That if the Prohibition be allowed, the Legatory hath no remedy, but that was denyed, for the party might sue in the Chancery: And after the Prohibition granted, the Court awarded a speciall consultation, quatenus non extendat ultra manus Executoris, & quatenus non agitur de validitate facti, i. the grant aforesaid.

Note, it was
adjudged con-
sary to this,
Mich. An.
Decem. 1653.
in the Kings
Bench, in
Doomsday
Case.

Hill. 28 Eliz. In the Kings Bench.

CCCLXXVII. Huddy, and Fishers Case.

Debt.

Attaint.

DEbt tra: brought upon a Bond, the Condition of which was for the performance of Covenants, Grants and Agreements in an Indenture: And in the Indenture it was recited, That in consideration that the said Huddy should build a Mill upon the Land demised by the Defendant to the Plaintiff by the same Indenture, and a Water-course by the Land demised, the Defendant leased the said Land to the Plaintiff, and the Lease was by the words Dedi & concessi: And the Plaintiff assigned the breach of the said Covenant in Law, in that the Defendant had stopped the said Water-course so made by the Plaintiff, upon which they were at issue, and it was found for the Plaintiff, upon which the Defendant brought Attaint, and the false oath was found, and it was moved in arrest of Judgment. That here is no Issue, and then by consequence no Verdict, and then no false oath, and then no cause of Attaint, for here the Issue is taken upon the stopping of the Water-course, which upon the shewing of the party is not any cause of action, for in the Indenture there is not any expresse Covenant, Clause, or Agreement,

ment, that the Lessee should enjoy the Water course so to be made, only there is a Covenant in Law rising upon these words, Dedi & concessi, which cannot extend to a thing not in esse at the time of the making of the Indenture, i. Coke who argued for the Defendants in the Attaint resembled this case, to the case in 23 E. 3. Garr. 77. Where it is holden, that the warranty knit to the Pannoz shall not extend to the Tenancy escheated: And 30 E. 3. 14. The Recovery in value shall not be in larger proportion then the Land warranted was at the time of the warranty made: So in our case, this Covenant shall not extend to any thing which was not in esse at the time of the Covenant made: And see 25. Ass. 2. where the Court shall reject a Verdict as part of a Verdict, &c. And because the now Plaintiff might after the Verdict, have alleged the same in arrest of Judgement which he did not, he shall not be helped by Attaint, but it shall be accounted his folly, that he would not for his own ease, and to avoid recant of Action shew the matter in way of Judgement: As 9 H. 6. 12. by Littleton: If a man be Censured of Felony, if the Judgement be insufficient, but he takes not advantage of it, but pleads the generall Issue, and is acquitted, he shall never after have a Writ of Conspiracy, &c. And for another cause Judgment ought not to be given in this Case, because it doth not appeare that Execution hath been sued, and then here is no party grieved; And then this Action being conceived upon the Statute of 23 H. 8. Cap. 3. which gives it to the party grieved, doth not lye, for a party grieved cannot be intended without Execution sued: See 21 H. 6. 55. by Paston; False oath, Judgment, and Execution doe entitle the party grieved to Attaint. And see the Statute of 23 H. 8. Enacts, That the party shall be restozed to as much as he hath lost, therefore he ought to lose (by Execution) before he be a person able to bring this Action: But as to that matter, see the Statute of 1 E. 3. 6. by which it is Enacted, That the Justices shall not leave to take Attaint for the damages not paid, so as before the said Statute no Attaint lay before Execution, 33 H. 6. 21. by Prison 5. H. 7. 22. t. E. 1. Attaint, 70. 8. E. 2. Assize, 396. And it was moved, That for another cause the Attaint doth not lye, as it is pursued in Procees upon it, for the Plaintiff hath not pursued the Statute, upon which the Attaint is founded, for the said Statute gives speciall Procees in this Case against the Petit Jury, Grand Jury, and the party, viz. Summons, Re-summons, and Distresse infinite, but in this Case the Plaintiff hath sued otherwise, which is against the direction of the Statute: And that was taken to be a materiall Exception by Clench and Gawdy Justices, for the Verdict doth not save the matter of Procees in this Case by the Statute of 18 Eliz. which doth not extend to proceedings in penall Causes; which see, by the words of the Statute, by an expresse Proviso: But Quere, If it be a penall Statute, because a lesser punishment is enacted by it, then that which was before inflicted upon such offenders: And as to the matter of Execution, Quere, If the Plaintiff be not pars gravata in hoc only, That he is subject to the said Judgment, and so lyable to Execution.

Hill 28 Eliz. In the Kings Bench.

CCCLXXVIII. Penruddock and Newmans Case.

In an Ejectione firmæ, the Plaintiff declared upon a lease made by the Lord Morley, and upon Not guilty pleaded, this speciall matter was found, That William Lord Mountegle, seised of the Pannoz of D, whereof, &c. became bounden in a Statute in such a sum to A, who dyed, the Executors of A sued Execution against the said Lord, i. upon the Extendi facias, a Liberate issued forth, upon which the said Pannoz was delivered to the said Executors.

Returne of
the Sheriff.

Executors, but was not returned, It was further found, That the said Executors being so possessed of the said Pannoz, the said Lord commanded a Court Baron to be holden there, which was holden accordingly by the sufferance of the Executors, and the said Executors were also present, at which time the Executors in the presence of the said Lord, said these words, viz. We have nothing to doe with this Pannoz; And upon this Verdict, two things were moved; If because the Liberate was not returned, the Execution was good: And as to that diverse Books were cited, 21 H. 6. 8. 18 E. 3. 25. And it was said that there was a difference, betwixt a Liberate, and a Capias ad Satisfaciendum, and Fieri facias, for these Writts are conditionall, Ita quod Habeas Corpus, &c. Ita, quod habeas denarios hic in Curia, 3 H. 7. 3. 16 H. 7. 14. But contrary in the Writ of Liberate, Habere facias seisinam, for in such Writts there is not such clause, and therefore if such Writts be not returned, the Execution done by virtue of them is good enough: And see 11 H. 4. 111. If the Sheriff, by force of an Elegit delivers to the party the moiety of the Land of the Defendant, and doth not returne the Writ, if now the Plaintiff will bring an Action of Debt, de Novo, the Defendant may plead in Bar the Execution aforesaid, although the Writ of execution were not returned, and yet the execution is not upon Record: And see the case there put by Haghford: And it is not like to the case of partition made by the Sheriff, the same ought to be returned, because that after the returne thereof, a new and Secondary Judgment is to be given, i. Quod partitio prædicta firma & stabilis maneat in perpetuum, firma & stabilis in perpetuum teneatur, see the Book of Entries, 114. And Egerton Solicitor, cited a case lately adjudged betwixt the Earle of Leicester, and the Widow Tanfeild, That such execution without returne was good enough. Another matter was moved: Admit, That here be a good execution, if now the Executors being in possession of the said Pannoz by force of that Execution, and permitting and suffering the Consoz to hold a Court there in the Pannoz house, and saying in his presence the words aforesaid, if the same doth amount to a Surrender by the Executors to the said Consoz or not. And Wray cheif Justice said, That here upon this matter is not any Surrender, for here the words are not addressed to the said Consoz who is capable of a Surrender, nor to any person certain: And it is not like to the case of 40 E. 3. 23, 24. Chamberlains Assise, where Tenant for life saith to him in the Reversion, That his will is that he enter, the same is a good Surrender, for there is a person certain who can take it, but contrary in this Case, for here it is but a generall speech: It was adjoined.

Earle of Leicester and Tanfeilds case.

Surrender,

Pasch. 28 Eliz. in the Common Pleas.

CCCLXXIX. Baskerville and the Bishop of Herefords Case.

Quare Impedit.

In a Quare Impedit by Walter Baskerville, against the Bishop of Hereford, &c. The Plaintiff counted, That Sir Nicholas Arnold was seised of the Abbotsdon as in grosse, and granted the same to the said Baskerville and others, to the use of himselfe for life, and afterwards to the use of Richard Arnold his Son in tail, Proviso, that if the said Nicholas dye, the said Richard being within age of twenty three years, that then the Grantees and their Heirs shall be seised to them and their Heirs untill the said Richard hath accomplished the said age: Nicholas dyeth, Richard being of the age of fourteen years, by force of which the Grantees were possessed of the said Abbotsdon, and afterwards the Church became void, and so it belonged to them to present: And Exception was taken to the Count because the Plaintiff had not averred the

life of Richard upon whose life the Interest of the Plaintiffs both depend, Averment.
And Gawdy Serjeant, likened it to the Case of the Parson which hath been
adjudged, That where the Lessee of a Parson brought an Ejectione firmæ,
and it was found for him, and in arrest of Judgment exception was taken to
the Declaration, because that the life of the Parson was not averred, and for
that cause Judgment was stayed: Anderson chief Justice: Upon the dying
of Sir Nicholas Rich being but of the age of fourteen years, an absolute Inter-
est for nine years not determinable upon the death of Richard, or rather, they
are seised in fee determinable upon the coming of Richard to the age of twen-
ty three years: Rhodes and Windham contrary: That here is an Interest
in the Grantees determinable upon the death of Richard within the Terme,
for if Richard dieth without issue within the Terme, the Remainder is limi-
ted over to a stranger: And as to the Exception to the Count: It was argu-
ed by Puckering Serjeant, that the Count was good enough, for although the
life of Richard be not expressly averred, yet such averment is strongly imply-
ed and so supplied: For the Count is, That dictus Nicholas obiit dicto Ric.
being of the age of fourteen years, & non amplius, by force of which the Plai-
ntiff was possessed of the said Advowson, quo quidem sic possessionato existente,
the Church became void, and possessed he could not be, if the said Richard had
not been then alive, and the same is as strong as an Averment: See 10 E. 4.
18. In Trespasse for breaking his close, the Defendant pleads, That A
was seised, and did enfeoff him, to which the Plaintiff said, That long time
before A had any thing, B was seised and leased to the said A at will who en-
feoffed the Defendant, upon which B did re-enter, and leased to the Plai-
ntiff at will, by force of which he was possessed untill the Plaintiff did the
Trespasse, and the same was allowed to be a good Replication, without aver-
ring the life of B who leased to the Plaintiff at will, for that is implied by the
words, i. virtute cuius the Plaintiff was possessed, untill the Defendant did
the Trespasse: And see also, 10 H. 7. 12. In an Assize of common, The
Plaintiff makes title, that he was seised of a Messuage, and of a Carve of
Land, to which he and all those whose estate, &c. have had common Appen-
dant, &c. And doth not say, that he is now seised of the Messuage: But this
exception was disallowed by the Court, for seisin shall be intended to continue
untill the contrary be shewed: It was adjourned.

Pasch. 28. Eliz. In the Exchequer.

CCCLXXX Carys Case.

[An Information in the Exchequer, by the Queen against Cary, the Case
was this; A man grants scitum rectorie cum decimis eidem pertinent. Hab- Tythes.
endum, scitum prædict. cum suis pertinentijs, for twenty years, the first Gran-
tee dyeth within the Terme, If now because the Tythes are not expressly
named in the Habendum, the Grantee shall have them for life only, was the
question: It was moved by Popham Attorney General, That the Gran-
tee had the Tythes but for life, and to that purpose he cited a Case adjudged,
6 Eliz. in the common Pleas: A man grants black Acre and white Acre,
Habendum black Acre for life, nothing of white Acre shall passe but at will,
and in the argument of that case, Anthony Browne put this case: Queen
Mary granted to Rochester such severall Offices, and shewed them specially,
Habendum two of them, and shewed which certain, for forty years, It was
adjudged that the two Offices which were not mentioned in the Habendum,
were to Rochester but for his life, and determined by his death: And so he
said, in this Case, The Tythes not mentioned in the Habendum, shall be to
the

the Grants for life, and then he dying, his Executors taking the Tythes are Intruders: But as to that, It was said by Manwood cheif Baron, That the cases are not alike, for the Grants in the cases cited are severall, intire, & distinct things, which doe not depend the one upon the other, but are in grosse by themselves: But in our Cases, The Tythes are parcell of the Rectory, and therefore for the nearnesse betwixt them, i. the Rectory and the Tythes, the Tythes upon the matter passe together with the scite of the Rectory for the Terme of twenty years, and Judgement was afterwards given accordingly.

Pasch. 26 Eliz. In the common Pleas, Mich. 27 & 28 Rot. 2431

CCCLXXXI. *The Lord Darcy and Sharpe's Case.*

Debt.

Raise of
Deeds.

Thomas Lord Darcy, Executor of John Lord Darcy, brought Debt upon a Bond against Sharpe, who pleaded that the Condition of the Bond was, That if the said Sharpe did performe all the Covenants, &c. contained with in a pale of Indentures, &c. By which Indentures the said John Lord Darcy had sold to the said Sharpe certian Trees growing, &c. And by the same Indentures Sharpe had covenanted to cut down the said Trees befoze the twentieth of August, 1684. and shewed further, That after the sealing and delivery of the said Indenture, the said Lord Darcy now Plaintiff, caused and procured 15 to raze the Indenture, quod penes prae dict. Querentem remanebat, and of 1684. to make it, 1685. & so the said Indenture became void; And the opinion of the whole Court was cleare against the Defendant, for the rasure is in a place not material; and also the rasure trencheth to the advantage of the Defendant himselfe who pleads it, and if the Indenture had become void by the rasure, the Obligation had been single and without Defeasance.

Pasch. 28 Eliz. In the common Pleas.

CCCLXXXII. *Rollston and Chambers Case.*

Costs, where
damages are
given.

Rollston brought an Action of Trespasse upon the Statute of 8 H. 6. of forcible Entry against Chambers, and upon Issue joyned it was found for the Plaintiff, and Damages assessed by the Jury, and costs of suit alle, and costs also, de incremento, were adjudged; And all were trebled in the Judgement, with this purclose, quæ quidem damna in toto se attingant al, &c. And all by the name of Damages: It was objected against this Joyment, That where damages are trebled, no costs shall be given, as in *Wick*, &c. But it was clearly agreed by the whole Court, That not only the costs assessed by the Jury, but also those which were adjudged, de incremento, should be trebled, and so were all the Presidents, as was affirmed by all the Preignothories, and so are many Books, 19 H. 6. 32. 14 H. 6. 13. 22 H. 6. 57. 12 E. 4. 1. And Book Entries, 334. and Judgement was given accordingly: And in this case it was agreed by all the Justices, That the party is convicted of the force at the suit of the party should be fined, notwithstanding that he was fined befoze upon Endowment for the same force.

Hill. 29. Eliz. In the common Pleas. Intrat. Trin. 27 Eliz.
Rot. 1606.

CCCLXXXIII. Jennor and Hardies Case.

The Case was, Lands were devised to one Edyth for life, upon condition that she should not marry, and if she dyed, or married, that then the Land should remaine to A in tail, and if A dyed without Issue of his body in the life of Edyth, that then the Land should remain to the said Edyth to dispose thereof at her pleasure: And if the said A did survive the said Edyth, that then the Lands should be divided betwixt the Sisters of the Devisor, A dyed without Issue living Edyth. Shuttleworth Serjeant: Edyth hath but for life. and yet he granted, That if Lands be devised to one to dispose at his will and pleasure without more saying. That the Deviser hath a Fee-simple, but otherwise it is, when those words are qualified and restrained by speciall Limitation: As 15 H. 7. 12. A man deviseth, That A shall have his Lands in perpetuum, during his life, he hath but an estate for life, for the words (during his life) do abridge the Interest given before: And 22 Eliz. one deviseth Lands to another for life, to dispose at his will and pleasure, he hath but an estate for life: And these words, (If A dyeth without Issue in the life of Edyth, That then the Lands should remain to Edyth to dispose at her pleasure) shall not be construed to give to Edyth a fee-simple, but to discharge the particular estate of the danger, penalty, and losse, which after might come by her marriage, so as now it is in her Libertie: And also he said, That by the Limitation of the latter Remainder, i. That the Lands should be divided betwixt the Daughters of his Sister, the meaning of the Devisor was not, that Edyth should have a Fee-simple, for the Remainder is not limited to her Heirs, &c. if A dyeth in the life of the said Edyth, for the Devisor goeth further, That if A overtakes Edyth, and afterwards dyeth without Issue, that the said Land should be divided, &c. Walmesley contrary: And he relyed much upon the words of the Limitation of the Remainder to Edyth, Quod integra remaneat dictæ Edythæ, and that she might dispose thereof at her pleasure, for the said division is limited to be upon a Contingent, i. if A survive Edyth, but if Edyth survive A, then his intent is not that the Lands should be divided, &c. but that they shall wholly remain to Edyth, which was granted by the whole Court, and the Justices did relye much upon the same reason; And they were very clear of opinion, That by those words Edyth had a Fee-simple; And Judgement was given accordingly. Anderson conceived, That it was a Condition, but although that it be a Condition, so as it may be doubted, if a Remainder might be limited upon a Condition, yet this devise is as good as a new devise in Reversion upon the precedent Condition, and not as a Remainder, quod Windham concessit, but Periam was very strong of opinion, That it is a Limitation: Two Joynt-tenants of a Terme, A and B; A grants his part to B, nothing passeth by it, for, 's a grant, it cannot be good, for as one Joynt-tenant cannot enclose his Companion, no more can he best any thing in him by grant, for he cannot grant to him a thing which he hath before; for Joynt-tenants are seised and possessed of the whole, all which was granted, per Curiam, and Anderson said, That if Lands be granted to A and B, and the Heirs of A, B cannot surrender to A, for a Surrender is as it were a grant; And as a Release it cannot enure, for a Release of a Right in Chattell cannot be without a Deed.

Hill. 29 Eliz. In the common Pleas.

CCCLXXXIV. Hollingshed and Kings Case.

Debt.

Hollingshed brought Debt against King, and declared, That King was bound to him in a Recognizance of two hundred pounds before the Mayor and Aldermen of London, in interiori Camera de Guildhall London, upon which Recognizance the said Hollingshed heretofore brought a Scire facias before the said Mayor, &c., in exteriori camera, and there had Judgment to recover upon which Recovery he hath brought this Action, and upon this Declaration, the Defendant did demur in Law, because that in setting forth of the Recognizance he hath not alleaged, That the Mayor of London hath Authority by Prescription or Grant to take Recognizances, and if he hath not, then is the Recognizance taken, Coram non Judice, and so void: And as to the Statute of West. 2. cap. 49. It cannot be taken to extend to Recognizances taken in London, which see by the words, De his quæ recordat. sunt coram cancellario Domini Regis & ejus iusticiariis qui recordum habent, & in rotulis eorum irrotulatur, &c. And also at the time of the making of that Statute, London had not any Sheriffs, but Bayliffs, and the said Statute ordains that Writs shall goe to Sheriffs, &c. But the whole Court was clear of a contrary opinion, for they said, Wee will know that those of London have a Court of Record, and every Court of Record hath an authority incident to it to take Recognizances, for all things which concerne the Jurisdiction of the said Court, and which arise by reason of matters there depending. Another matter was objected, for that, The Recognizance was taken in interiori camera, but the Court was holden in exteriori camera, and therefore not pursuant: But as to that, It was said by the Lord Anderson, That admit that the Recognizance was not well taken, yet because that in the Scire facias upon it, the Defendant did not take advantage then thereof, he shall be bounden by his said admittance of it, as if one sue forth a Scire facias as upon a Recognizance, whereas in truth there is not any Recognizance, and the party pleades admitting such Record, and thereupon Judgment is given against him, it is not void, but voidable. Fleetwood Recorder of London, alleaged many Cases to prove that the Courts of the King are bound to take notice, That they of London have a Court of Record, for if a Quo warranto issued to Justices in Eyre, it behoves not them of London to claime their Liberties, for all Courts of the King, are to take notice of them: And at the last after many motions, the opinion of the Court was for the Plaintiff: And it was said by Anderson, and in a manner agreed by the whole Court, That if depending this Demurrer here, the Judgment in London upon the Scire facias be reversed, yet the Court here must proceed, and not take notice of the said Reversall.

Privileges of
London.

Hill 29 Eliz. In the common Pleas.

CCCLXXXV. Bedingsfeild and Bedingsfeilds Case.

Dower.

Dower was brought by Anne Bedingsfeild against Thomas Bedingsfeild, The Tenant out of the Chancery purchased a Writ, de circumspete agatis, setting forth this matter, That it was found by Office in the County of Norfolk, that the Husband of the Demandant was seised of the Mannor of N, in the said County, and held the same of the Queen by Knights service

in cheif, and thereof dyed seised, the Tenant being his Son and Heire of full age, by reason whereof the Queen seised as well the said Mannor as other Mannors, and because the Queen was to restore the Tenements, tam integre, &c. as they come to her hands, it was commanded the Judges to surceale, *Primer seisin* Domina regina inconsulta: It was resolved, per Curiam, That although the Queen be entituled to have Primer seisin of all the Lands, whereof the Husband of the Demandant dyed seised, yet this *Writ* did not extend unto any Mannors not found in the Office, for by the Law, the Queen cannot seile more Lands then those which are contained in the Office: And therefore as to the Land not found by the Office, the Court gave day to the Tenant to plead in cheife: And it was argued by Serjeant Gawdy for the Tenant, That the Demandant ought to sue in the Chancery, because that the Queen is seised, to have her Primer seisin, and cited the case of 11 R. 2. and 11 H. 4. 193. And after many motions, It was clearly agreed by the Court, That the Tenant ought to answer over, for the Statute, De Bigamis Cap. 3. provides that in such case, The Justices shall proceed notwithstanding such seisin of the King, and where the King grants the custody of the Tenant himselfe, 1 H. 7. 18. 19. 4 H. 7. 1. A Mulco fortiori against the Heire himselfe where he is of full age, notwithstanding the possession of the King for his Primer seisin, by the Statute of Bigamis after the Heire was of full age, the *Wife* could not be endowed in the Chancery: But now by the Provisative of the King, such wides may be endowed there, Si vidua illa voluerint, and after many motions, The Court awarded, That the Tenant should plead in cheif, at his perill for the Demandant might sue at the common Law if shee pleased.

CCCLXXXVI. Hil. 28. Eliz. In the common Pleas

The Case was, The Husband was seised of Lands in the right of his *Exchange* *Wife*, the Husband and his *Wife* both joyned in exchange of the Lands with a stranger for other Lands, which exchange was executed, the Husband and the *Wife* seised of the Lands taken in exchange, aliened the same by fine, It was holden by Rhodes and Windham Justices, That the *Wife* after the death of her Husband might enter into her own Lands notwithstanding that fine; And Rhodes resembled it to the case reported by my Lord Dyer, 19. Eliz. 338. The Husband after marriage assured to his *Wife* a Joynture, they both levy a fine, Sur Copulans de droit come ceo que il ad, of the gift of the Husband; that the same is not any Bar to the *Wife* of her Power, for the Election is not given to the wife to claim her Joynture, or her Dower, untill after the death of her Husband: And so in the principall case Judgement was given for the *Wife*.

Pasch. 26. Eliz. In the Kings Bench.

CCCLXXXVI. Lees Case.

Nicholas Lee by his will devised his Lands to William his second Son; And if he depart this *Worlde* not having issue; Then I will that my Sons in Law shall sell my Lands, the Debitor at the time of his devils having six Sons in Law, dyed, William had Issue John, and dyed, John dyed without Issue, one of the Sons in Law of the Debitor dyed, the six surviving Sons in Law sold the Lands: first it was clearly resolved by the whole Court, That although the words of the *Will* are (ut supra) If Willi-

Devises

am my Son depart this world not having Issue, &c. And that William had Issue who dyed without Issue, here, although it cannot be literally said, That William did depart this world not having issue; yet the intent of the Devisor is not to be restrained to the letter, that such construction shall be made, That whensoever William dyeth, in Law, or upon the matter without Issue, that the Land shall be subject to sale, according to the authority committed by the Devisor to his Sons in Law: And now upon the matter William is dead without Issue: As in a Formdon in Reverter or Remainder, although that the Donee in tail hath issue, yet if after the estate tail be spent, the Will shall suppose that the Donee dyed without Issue; a fortiori in the Case of a Will, or Devise, such construction shall be made. As to the other point, concerning the sale of the Lands, Wray asked, If the Sons in Law were named in the Will, and the Clerks answered, No: See 30 H. 8. Br. Devise, 31. and 39. Ass. 17, Executors, 117. such a sale good in case of Executors: See also 23 Eliz. Dyer, 371. and Dyer 4, & 5. Phil. and Mary, Lands devised in tail, and if the Devisee shall dye without Issue, that then the Land shall be sold, pro optimo valore, by his Executors, cum assensu A, if A dyeth before sale, the power of the Executors is determined: And afterwards it was clearly resolved by the whole Court, That the sale, for the manner, was good, and Judgment was given accordingly.

Paſch. 26 Eliz. In the Kings Bench.

CCCLXXXVIII. *Sir Gilbert Gerrard and Sherringtons Case.*

Sir Gilbert Gerrard Master of the Rolls, Libelled in the Spirituall Court, Against Sherrington, and A his Servant for Tythes parcell of a Rectory, whereof the said Sir Gilbert was Fermor to the Queen; It was moved by Egerton Solicitor General, That against the Kings Fermor a Prohibition doth not lye: But the opinion of the whole Court was, That a Prohibition doth lye, and so it hath been adjudged before. And afterwards, Exception was taken to the surmise, because the said Sir Gilbert had Libelled against the said Sherrington and his Servant severally, and now in the Kings Bench they both had made a joynit surmise, whereas they ought to have severally made their surmises according to the severall Libells: And it was so adjudged by the Court, and therefore they were driven to make severall surmises: And afterwards Exception was taken, because the said Sherrington and his Servant, had delivered their surmises and suggestions by Attorney, where they ought to be in proper person: See the Statute of 2 E. 6. cap. 13. The party shall bring and deliver to the hands of some of the Justices of the same Court, &c. the true Coppy of the Libell, &c. subscribed or marked with the hand of the Party, &c. and under the Coppy shall be written the surmise or suggestion; And although it was affirmed by the Clerks of the Court, that the common use and practise for twenty years had been, not to receive such surmises or suggestions by Attorney: Yet it was resolved by the whole Court, that it ought to be by Attorney.

Pasch. 26 Eliz. In the Kings Bench.

CCCLXXXIX. Short and Shorts Case.

In an Action upon the Case upon Assumpsit to pay money to the Plaintiff upon Request: It was agreed, That the Plaintiff by way of Declaration, ought to allege an actual Request, and at what place, and at what day the Request was made: And it is not sufficient to say, as in an Action of Debt, *Licet scriptus requisitus*, &c. and so it was adjudged. Request.

CCCXC. *Pasch. 26 Eliz. In the Kings Bench.*

One was Endited in the County of Lincolne upon the Statutes of 1. Cap. 33. and 2. R. 2. Cap. 5. of Newes, and the words were, That Campian was not executed for treason, but for Religion, and that he was as honest a man as Cranmer, the Bill was endorsed, *Billa vera*, but together, *ista verba prolata fuerunt*, malitiose, sediciose, &c. e contr. *ignoramus*: The same Indictment being removed into the Kings Bench, the party, for the causes aforesaid, was discharged. Indictment upon the Statute of newes

Pasch. 26. Eliz. In the Kings Bench.

CCCXCI. Cole and Freindships Case.

In Ejectione firmæ, the Case was, That Fricarrock was seised, and by In- Leases,
venture betwixt himselfe of the one part, and one Freindship, his Wife and the Childzen betwixt them begotten at the Assignment of the Husband of the other part, leased the said Land to the said Husband his Wife and their Childzen, at the Assignment of the Husband for years, they having at the time of the said Lease but one Child, i. a Son, afterwards they had many Childzen, the wife died, the Husband by his will assigned his second Son bozne after the making of the Lease, to have the residue of the said Terme, and by the opinion of the Court nothing can come to the said Son by that Lease, or by that Assignment, for if the Interest doth not vest at the beginning, it shall never vest; And afterwards it was moved, If in as much as nothing could vest in any of the Childzen bozn after the Lease made, if these words (At the Assignment of the Husband) should be void, and then the case should be no more, but that Land is devised to the Father and Mother, and their Childzen: At another day, viz. Trin. 26 Eliz. the case was moved again, and as to the first payment, the Court was of opinion as befoze, That the Child assigned after the Lease made, should not take: And then it was moved, That because Freindship and his Wife at the time of the making of the said Lease had one Son that he should take with his Father and Mother, and that the words (at the Assignment of Freindship) should be void, is matter of sur- Assignments,
plusage, and the word Childzen a good name of purchase: But the whole Court was against that conceit, for these words in the case, at the Assignment of Freindship are not void, but shew what person should take, if the intent of the party should take effect, i. he who the Father by Assignment should enable, for no Child shall take but he who the Father shall assigne, that is part of the contract. and although by such Assignment no title accrues to the Child assigned, yet without Assignment no child is capable, for by the Lease the Father hath such Liberty that he may assigne what child, he will: And by

by Wray, If the words of the Lease had been (at the assignment of the Father within one moneth) and the Father surcease his moneth, the Interest should not vest in any of the Childzen: And by Ayliff Justice, If the words of the Lease had been (to the Husband and wife and their Son John, where his name is William) nothing should vest: And peradventure in this case at the Bar, if the Father had assigned his Son then borne, and had assigned him before or at the time of the Lease, i. the delivery of the Lease, it had been well enough: Note that this Action was brought by Cole Lessee of the Son of the Husband and Wife borne at the time of the Lease made: And afterwards Wray, with the assent of all the rest of the Justices, gave Judgment that the Plaintiff, *Nihil capiat per Billam.*

CCCCXII. *Passch. 26 Eliz.* In the Kings Bench.

Execution
here joynr.
here severall.

NOTE. It was agreed by the whole Court and affirmed by the clerks: That if Debt be brought upon an Obligation against two upon a joynr Præcipe, and the Plaintiff hath judgment to recover, that a joynr Execution ought to be sued against them both: But if the suit were by one Original and severall Præcipes, Execution might be sued against any of them.

CCCXCIII. *Trin. 26 Eliz.* In the Kings Bench.

Replevin.

In a Replevin, The Defendant doth avow per Damage Feasant, and sheweth that the Lady Jermingham was seised of such a Mannor whereof, &c. and leased the same to the Defendant for years, &c. The Plaintiff said, That long before King H. 8. was seised of the said Mannor, and that the place where is parcell of the said Mannor demised and demisable by copy, &c. and the said King by his Steward demised and granted the said parcell to the Ancestour of the Plaintiff whose heire he is, by copy in fee, &c. upon which it was demurred, because by this Bar to the Abowry, the Lease set forth in the Abowry is not answered, for the Plaintiff in the Bar to the Abowry, ought to have concluded, and so was seised by the custome, untill the Abowry, prætenu of the said Terme for years entered: And so it was adjudged.

Trin. 26. Eliz. In the Kings Bench.

CCCXCIV. *The Lord Dacres Case.*

Stewardship
of a Mannor:
Office of
Trust.

Grants per
Copy, Deputy
Steward.

In Ejectione firmæ, the case was, That the Lord Dacres was seised of the Mannor of Eversham, and that he held the place where of the said Mannor by copy for terme of his life, and the said Lord granted the Stewardship of the said Mannor to the now Parquette of Winchester, who appointed one Chedle to be his Deputy to keep a court, & ad tradendum, the said Land (is being now dead) to one Wilkins by copy for life, afterwards, the said Chedle commanded one Hardy his Servant to keep the said court, and grant the said Land by copy, *ut supra*, which was done accordingly, the copy was entered, and the Lord Dacres subsigned it and confirmed it: It was further found, That Hardy had many times kept the said court both before and after, and that the custome of the Mannor was, that the Steward of the said Mannor for the time being, or his Deputy might take Surrenders, and grant estates by copy: And if this estate so granted by Hardy were good or not, was the question, because by the Servant of the Deputy, whereas the custome found did not extend

tend further then the Deputy: It was argued that the estate granted, ut supra, was void, for a Deputy cannot transfer his authority over, for it is an office of trust: See 39. H. 6. 33, 34. 14 E. 4. 1. and 6 Eliz. it was adjudged, That the Duke of Somerset had diverse Stewards of his Lands, and they, in the name of the said Duke made diverse Leases of the Lands of the said Duke, rendring Rent, and the Duke, afterwards assented to the said Leases, and received the Rents reserved upon them, and yet after the death of the said Duke, the Earle of Hertford his Son and Heire avoied them: So here, the assent, and the sub-signment of the copy by the Lord Dacres, both not give any strength to the copy which was void at the beginning; against which it was said, That to take a Surrender, and to grant an estate by copy is not any judiciall Act, but meerly an Act of service, and no matter of trust is transferred to Hardy, for trust is reposed in him who may deceive, which cannot be in our Case, for here is an expresse commandment, which if Hardy transgresseth it is absolute void, for nothing is left to his discretion: And the admitting of a Copy-holder is not any judiciall Act, for there need not be any of the Suitors there who are the Judges: And such a Court may be holden out of the Precinct of the Mannor, for no Pleas are holden, which was concessam per totam Curiam: And by Ayliff Justice, If the Lord of such a Mannor makes a feoffment of a parcell of his Mannor which is holden by copy for life, and afterwards the Copy-holder dyeth, although now the Lord hath not any Court, yet the feoffee may grant over the Land by copy againe: And the whole Court was clear of opinion, That the grant for the manner of it was good, Especially because the Lord Dacres agreed to it; And Judgment was given accordingly.

Trin. 26. Eliz. in the Kings Bench:

CCCXCV. *Burgesse and Fosters Case.*

In Ejectione firmæ, the case was, That the Dean and Chapter of Ely were Ilesed of the Mannor of Sutton, whereof the place where, &c. is parcell, demised and demisable by copy according to the custome, and by their Deed granted the Stewardship of the said Mannor to one Adams to execute the said office, per se vel legitimum suum Deputatum eis acceptabilem: Afterwards Adams made a Letter of Deputation to one Mariot, ad capiendum unum sursum reddicionem, of one I W, and I his Wife, and to examine the said I, forsoresaid, as intencion, that the said I W and A might take back an estate for their lives, the Remainder over to one Joan Buck in fee (Note, the Surrendor ought be, de duobus Messuagijs) Mariot took two severall Surrenders from the said Husband and Wife, the Remainder over to the said John Buck in fee, upon condition to pay a certain sum of money, &c. I was moved, That the Surrender is void, and without warrant, for the warrant was, ad capiendum unum sursum-reddicionem, and here are two severall Surrenders, and so the warrant is not pursued, and then the Surrender is void: Another matter was because the Remainder to John Buck by the words of the Deputation was absolute and without Condition, and now in the Execution of it, it is conditionall, so as this conditionall estate is not warranted by the Deputation: But the whole Court was clear of a contrary opinion in both the points, and that all the proceedings were sufficient and well warranted by the Deputation: Another matter was objected, because that this Surrender and re-grant is entred in the Roll of a Court, dated to be holden the second of Maij, and the Letter of Deputation beares date the thirde of June after: But as to that, The Court was clear of opinion, that the misentry

of the date of the Court should not prejudice the party, for this Entry is not matter of Record, but is but an Escape, and if the parties had been at Issue, upon the time of the Surrender made, or of the Court holden, the same should not be tried by the Rolls of the Pannor, but by the Country, and the party might give in Evidence the truth of the matter, and should not be bound by the Roll, and according to this Resolution of the Court, Judgement was given.

CCCXXI. Mich. 26, & 27. Eliz. In the Kings Bench.

Fines levied.

Scire facias.

The Case was: Tenant in tail leased for sixty years, and afterwards leased a fine to Lee and Loveday, Sur Conusans de droit come ceo, &c. with a Render to him and his Heirs in fee; And upon a Scire facias against the Conusees, supposing the Lands to be ancient Demesne, the Defendants made default for which the fine was aboynded, and now the Issue in tail entered upon the Lessee for years, and he brought an Ejectione firmæ, and it was found, That the Land was frank fee; And all the question was, If by the Reversall of the fine by writ of Disceit, without suing forth a Scire facias against the Terr. Tenant should bind him, or should be void only against the Conuser, and not against the Lessee: Actin. It shall not bind the Lessee for years: for a fine may bind in part, & in part not: as bind one of the Conusees, and not the other, 7 H. 4. 111. A fine levied of Lands, part ancient Demesne, & part at the common Law, the same was by writ of Disceit reversed in part, as to the Land in ancient Demesne, and stood in force for the residue, 8 H. 4. 136. And there by award of the Court issueth forth a Scire facias against the Terr. Tenants, and the Justices would not adnuil the fine, without a certificate that the Land was Ancient Demesne, notwithstanding that the Defendant had acknowledged it to be so, but as to them who were parties to the fine, the fine is become void as to the said parties, and he who had the Land before might enter, i. And he said it should be a great inconvenience, if no Scire facias, or other Process should be awarded against the Terr. Tenant, for he should be disposed and disinherited without prize, or notice of it, where upon a Scire facias, he might plead matter of discharge, and Bar of the writ of Disceit, as a Release, &c. which see Fitz. N. B. 98. And so although the fine be reversed, yet he might retain the Land, and he resembled this case to the case of 2 H. 4. 16, 17. In a contra formam collationis against an Abbot, a Scire facias shall issue forth against the Feoffee, and so by the same reason here: And for the principall matter he said, That the fine should be avoided but against the parties, but not against the Lessee: Kingsmill, The Scire facias brought against the parties only is good enough, for they were parties to the Disceit, and not the Terr. tenants: It was adjourned.

CCCXCVII. Mich. 26, & 27. Eliz. In the Kings Bench.

Error.

Appearance
by Attorney.

A writ of Error was brought upon a Judgment in a Quid juris clamor, It was assigned for Error, that the Tenant did appeare by Attorney, whereas he ought not but in person because he is to doe an Act in proper person, if it be not in case of necessity, where the Attorney may be received by the Kings writ, or plead matter in Bar, of the Attornment, as if he claims fee, &c. or other peremptory matter, after which Plea pleaded he may make Attorney, 48 E. 3. 24. 7. H. 6. 69. 21 E. 3. 48. 1 H. 7. 27. Another Error was because it is not shewed in the Quid juris clamor, what estate the Tenant hath: Another matter was, If the Grantee of the estate of Tenant in tail after possibility of issue extinct shall be given to attorney, and it was said

said he should not, for the privilege doth passe with the grant: See 43 E. 3. 1. Tenant in tail after possibility of issue extinct shall not be given to attorne, 46 E. 3. 13. 27. Ergo, neither his Grantee: Williams contrary, As to the appearance of the Tenant by Attorney, because the same is admitted by the Court, and the Plaintiff, the same is not Error, which see 1 H. 7. 27. by Brian and Conisby, 32 H. 6. 22. And he said, That the Grantee should be given to attorne, for no other person can have the estate of the Tenant in tail after possibility of issue extinct, but the party himselfe, therefore not the privilege, and although he himselfe be punishable of Waste, yet his Grantee shall not have such privilege. As if Tenant in Dower, or by the curtesie, grant over their estates, the Heire shall have Waste against the Grantors for Waste done by the Grantee, but if the heir granteth over his Reversion, then Waste shall be brought against the Grantees: See Fitz. N.B. 56. And if two Coparceners be, and the one taketh a Husband and dyeth the Husband being Tenant by the curtesie, a Writ of Partition lyeth against him, but if he granteth over his estate, no Writ of Partition lyeth against the Grantee, 27 H. 6. Stachams Aib. Tenant in tail after possibility of issue extinct shall not have Aide, but his Grantee shall have Aide, Clark, The Grantee of Tenant in tail shall not be given to attorne, If Tenant in tail grant corum flatum suum, the Grantee is punishable of waste, so if his Grantee grant it over his Grantee is also punishable, &c. It was adjourned.

If the Grantee
or Tenant af-
ter possibility
shall attorne;

Mich. 26 & 27. Eliz. In the Kings Bench.

CCCXVIII. Gravenor and Masseys Case.

Gravenor brought a Writ of Error upon a common Recovery against Massey: And in the said Recovery four Husbands and their Wives were vouched, and now the Plaintiff brought this Writ of Error as heir to one of the Husbands, and Exception was taken to his Writ, because the Plaintiff doth not make himselfe heir to the Survivor of the four Husbands. Egerton, The Writ is good enough, for there is a difference betwixt a Co-tenant personall, and a Cotenant reall, for if two be bound to warranty, and the one dyeth, the Survivor and the heir of the other shall be vouched, and he said each of the four and their heirs are charged, and then the heir of each of them being chargeable, the heir of any of them may have a Writ of Error. And afterwards the Writ of Error was adjudged good: And Error was assigned because the Touches appeared the same day that they were vouched by Attorney, which they ought not to doe by Law, but they might appeare gratis the first day without Proces in their proper persons, and so at the sequator sub suo periculo: See 13 E. 3. Attorn, 74. and 8 E. 2. ib. 101. And the Error was assigned Because the Entry of the warrant of Attorney, for one of th Touches is po. lo. suo, l D against the Tenant where it should be against the Demandant, for presently when the Toucher entreteth into the warranty, he is Tenant in Law to the Demandant: Coke, As to the first Error, Although he cannot appeare by Attorney, yet when the Court hath admitted his appearance by Attorney, the same is well enough, and is not Error: As to the other Error, I confesse it to be Error, but we hope that the Court will have great consideration of this case as to that Error, for there are one hundred Recoveries erroneous in this point, if it may be called an Error: And then we hope, to avoid such a generall mischief, that the Court will consider and dispense with the rigor of the Law: As their Predecessors did, 39 H. 6. 30. In the Writ of Refine: But I conceive, That the Writ of Error is not well brought, for the Toucher in the said Recovery is of four Husbands and their Wives, and when Toucher shall be intended to be in

Error.

the right of their Wives, which see 20 H. 7. 1. b. 46 E. 3. 28. 29 E. 3. 49. And so by common intendment, the Voucher shall be construed in respect of the Wife; So also the Plaintiff here ought to entitle himselfe as this Writ of Error as heir to the Wife: And for this cause, The Plaintiff relinquished his Writ of Error; And afterwards he brought a new Writ, and entituled himselfe as heir to the wife.

Mich. 26 & 27 Eliz. In the Kings Bench.

CCCXCIX. *The Queen, and the Dean of Christchurch Case.*

PRÆMUNIRE.

The Queens Attorneys Generall brought and prosecuted a Præmunire for the Queen, and Parret against Doctor Matthew Dean of Christchurch in Oxford, and others, because they did procure the said Parret to be sued in the City of Oxford, before the Commissary there in an Action of Trespasse, by Libell according to the Ecclesiasticall Law, in which suit Parret pleaded, Son Franktenent, and so to the Jurisdiction of the Court, and yet they did proceed, and Parret was condemned and imprisoned: And after that suit depended, The Queens Attorneys withdrew the suit for the Queen; And it was moved, If notwithstanding that the party grieved might proceed: See 7 E. 4. 2. b. The King shall have Præmunire, and the party grieved his Action: See Br. Præmunire, 13. And by Brook none can have Præmunire but the King: Coke, There is a President in the Book of Entries, 427. In a Præmunire, the words are (ad respondendum tam Domino Regi, quam R. F) and that upon the Statute of 16 R. 2. and ibi. 428, 429. Ad respondendum tam Domino Regi de contemptu, quam dict. A. B. de damnis: But it was holden by the whole Court, That if the Kings Attorneys will not further prosecute, the party grieved cannot maintain this suit, for the principall matter in the Præmunire is, The conviction and the putting of the party out of the protection of the King, and the damages are but accessory, and then the principall being released, the damages are gon: And also it was holden by the Court, That the Presidents in the Book of Entries are not to be regarded, for there is not any Judgment upon any of the pleadings there, but are good directions for pleadings, and not otherwise.

CCCC. *Mich. 26, & 27 Eliz. In the Kings Bench.*

Fin's levied.

Forfeiture.

Conditions.

The Case was, A gave Lands in tail to B upon condition, That if the Donee or any of his heirs alien, or discontinue, &c. the Land or any part of it, that then the Donor to re-enter: The Donee hath issue two Daughters and dyeth: One of the two Daughters leaveth a Fine, Sur Conusans de droit come ceo, to her Sister: Heale Serjeant, The Donor may enter, for although the Sisters to many intents are but one Heire, yet in truth they are severall Heirs, and each of them shall sue Liberty, 17 E. 3. If one of the Sisters be discharged by the Lord, the Lord shall lose the Wardship of her, and yet the heire is not discharged: And if every Sister be heire to diverse respects, then the Fine by the one Sister is a cause of Forfeiture: Harris contrary, For conditions which goe in defeating of estates shall be taken shortly, and here both the Sisters are one heire, and therefore the discontinuance by the one, is not the Act of the other: Clench Justice, The words are, Or any of his heirs, therefore it is a forfeiture, quod fuit concessum per totam Curiam: And Judgment was given accordingly.

Mich.

CCCCI. Mich. 26, & 27 Eliz. In the Kings Bench.

The Case was, A woman seised of a Kent-charge for life, took Husband, ^{Assumpsit} the Kent was arreare, the wife dyed, the Tenant of the Land charged; Promised to pay the Kent in consideration that the Kent was behind, &c. and some were of opinion, Because that this Kent is due and payable by a Deed, that this Action of the Case upon Assumpsit will not lye, no more then if the Obligor will promise to the Obligee to pay the money due by the Obligation, an Action doth not lye upon the Promise, but upon the Obligation; But it was holden by the whole Court, That the Action did well lye, for here the Husband had remedy by the Statute of 32 H. 8. And then the consideration is sufficient, and so Judgment was given for the Plaintiff.

Hill. 27. Eliz. In the Kings Bench.

CCCCII. Williams and Blowers Case.

R Eignold Williams and John Powell brought a Writ of Error against the ^{Error.} Bishop of Hereford and Blower upon a Recovery had in a Writ of Disceit by the said Bishop and Blower against the said Williams and Powell, for that the said Williams had before brought a Quare Impedit against the said Blower and the Bishop, and had recovered against them by default, where, upon Williams had a Writ to the Metropolitane to admit his Clerke, and in the Writ of Disceit Judgment was given for the Plaintiffs; for it was found, That the Summons was the Fryday to appeare the Tuesday after, And so an insufficient Summons, and in that Writ of Disceit the Defendants, Williams and Powell pleaded, That Blower the Incumbent was deprived of his Benefice in the Court of Audience, which sentence was affirmed upon Appeal before the Delegates; and notwithstanding that Plea, Judgment was given against Williams and Powell Defendants in the said Writ of Disceit: And upon that Judgment, This Writ of Error is brought. Beaumont assigned four Errors, First, because the Bishop and Blower joyned in the Writ of Disceit, for their Rights are severall, 12 E. 4. 6. Two cannot joine in an Action of Trespasse upon a Battery done at one time to them: So if one distrain at one and the same time, the severall Goods of diverse persons, they according to their severall properties shall have severall Replevins, 12 H. 7. 7. By Wood: So if Lands be given to two, and to the heirs of one, and they lose by default in a Præcipe brought against them, they shall have severall Writs, the one Quod ei de forceat, the other a Writ of Action. ^{Joynder in} Right: 46 E. 3. 21. A Fine leygged to one for life, the Remainder to two ^{Action.} Husbands and their Wives in tail, they have Issue and dye, Tenant for life dyeth, the Issues of the Husbands and Wives shall have severall Scire facias's to execute the Fine by reason of their severall Rights: Lands in ancient Demesne holden severally of severall Lords are conveyed by Fine, the Lords cannot joine in a Writ of Disceit, but they ought to have severall Writs, so here the Plaintiffs in this Writ of Disceit, and the Bishop claims nothing but as Ordinary, and he loseth nothing in the Quare Impedit, and therefore by the Writ of Disceit he shall be restored to nothing: The second Error was, Because the Bar of the Defendants in the Writ of Disceit was good, i. the deprivation, &c. and the Court adjudged it not good, for the Clerk being deprived, he could not enjoy the Benefice, if the Judgment in the Quare Impedit had been reversed, and where a man cannot have the effect of his suit, it is in vain to bring any Action; Lessee for the life of another loseth ^{Reynolds} by

by erroneous Judgment, Cestuy que use dyeth, his Writ of Error is gon, for if the Judgment be reversed he cannot be restozed to the Land, for the estate is determined. 31 E. 3. Incumbent, 6. The King brought a Quare Impedit against the Incumbent and the Bishop, the Bishop claimed nothing but as Ordinary; The Incumbent traversed the title of the King, against which, it was replied for the King, That the Incumbent had resigned pendant the Writ, so as now he could not plead any thing against the title of the King, for he had not possession, and so could not counterplead the possession of the King: And here in our Case by this deprivation the Incumbent is disabled to maintain this Action of Disceit, 15 Ass. 8. If the Guardian of a Chappell be impleaded in a Præcipe for the Lands of his Chappell, and, pendant the Writ, he resigne, the Successor shall have the Writ of Error, and not he who resignes, for he is not to be restozed to the Lands, having resigned his Chappell: So in our case, A deprivation is as strong as a Resignation. The third Error, because in the Writ of Disceit, it is not set forth that Blower was Incumbent, for the Writ of Disceit ought to containe all the speciall matter of the Case, as an Action upon the case, 4 E. 3. Disceit, 45. The fourth Error, That upon suggestion made after Cleridia, that Blower was Incumbent, and in, of the presentment of the Lord Scafford, and that he was removed; and Griffin in by the Recovery in the Quare Impedit by default, a Writ to the Bishop was awarded without any Scire facias against Griffin, for he is possessor, and so the Statute of 25 E. 3. calls him, and gibes him authority to plead against the King, and every Release, or Confirmation made to him is good, 18 E. 3. Confirmation made by the King after Recovery against the Incumbent is good; And 9 H. 7. If a Recovery be had in a Contra formam collationis, the possessor shall not be ousted without a Scire facias, so in Audita Querela upon a Statute Staple, Scire facias shall go against the Assignee of the Connsee, 15 E. 3. Respon. 1. See also, 16 E. 3. Disceit, 35; 21 Ass. 13. A Fine leyed of Lands in Ancient Demesne shall not be reversed without a Scire facias against the Tenant: Walmesley contrary, The case at the Bar differs from the case put of the other side, for they are cases put upon Original Writs, but our case is upon a judiciall Writ, and here nothing is demanded but the Defendant is only to answer to the Disceit and false hood: And in this Case the Issue is contained in the Writ which is not in any Original Writ, and the Judges shall examine the issue without any plea or appearance of the Tenant, and here the Defendant is not to plead any thing to excuse himselfe of the wrong; And here the Judgment is notto recover any thing in demand, but only to restoze the party to his former estate, and possession, and if he hath nothing, he shall be restozed to nothing; And he put many cases where persons who have severall Rights may joine in one Action, as a Recovery in an Assize against severall Tenants, they may joine in one Writ of Error, 18 Ass. Recovery in Assize against Disseisor and Tenant, they shall both joine in Error, why not also in Disceit: 19 E. 3. Recovery against two Caparceners, the Survivor and the heir of the other shall joine in Error. As to the second Error, Williams and the Sheriff ought not to joine in the Plea, and also the Plea it selfe is not good, for the Writ of Disceit is, That Williams answer to the Disceit, and the Sheriff shall certifie the proceedings and therefore he shall not plead: and also the Plea it selfe is not good, for although the Interest of the Incumbent be determined in the Church, yet his Action is not gone; as if in a Præcipe quod reddat, the Tenant alieneth pendant the Writ, and afterwards the Demandant recovereth, yet the Tenant although his Interest be gon by the Judgment, yet he shall have a Writ of Error, and so here, and as to the Scire facias, there needs none here against the new Incumbent, for he comes in, pen-

dant

Deprivation.

Scire facias.

nant the writ, and that appears by the Record, but if he had been in before the writ brought, then a Scire facias would lye: See 9 H. 6. It was adjourned.

Mich. 26, & 27 Eliz. In the Kings Bench.

CCCCIII. Flemmings Case.

Flemming was indicted upon the Statute of 1 Eliz. because he had given the Sacrament of Baptisme in other forms then is prescribed in the said Statute, and in the Book of common Prayer, and the said Indictment was before the Justices of Assize, Wray and Anderson, Of such offence done before, and now he is indicted againe, for which, It was awarded that he suffer Imprisonment for a year, and shall be adjudged, ipso facto, deprived of all his spirituall promotions: And upon the Indictment Flemming brought a writ of Error, and assigned Error because in the second Indictment no mention is made of the first Indictment, in which case the second Indictment doth not warrant such Judgment: Wray Justice, If the first Indictment be before us, then in the second Judgment well given, contrary if it be before other Justices. Clench, The second Indictment ought to conceive the first conviction, and if one be indicted for a Rogue in the second degree, the first conviction ought to be contained in such Indictment, and in an Indictment the day and time are not materiall as to true recovering in fact: And it might be that this last Indictment was for the first offence for any thing appereth: Coke who argued to the same intent, Compared it to the Case of 1 R. 2. 9. and 22 E. 4. 12. 12 H. 7. 25. Indictment certified to be taken coram A B Justiciarijs Domini Regis ad pacem, &c. without saying, nec non ad diversas felonias, &c. is hold, and if a man hath been once convicted, he shall not have his Clergy if it appereth upon Record before the same Justices, that he had his Clergy before.

Indictment
upon Statute
1 Eliz.

Hil. 27. Eliz. In the Kings Bench.

CCCCIV. The Mayor of Lynns Case.

The Mayor of Lynns was Indicted for that he had received twenty four shillings of one A for giving of Judgment in an Action of Debt, depending before him against one B, and he was indicted thereof as of extortion, In contemptum dictæ Dominæ Reginæ, & contra formam Statuti: Coke, The Indictment is insufficient for there is not any Statute to punish any Judge for such a matter: For the Statute of West. 1. Cap. 26. is made against Sheriffs, Cap. 27. Clerks of Justices, Cap. 30. The Marshall and his Servants, Statute 23 H. 6. against Sheriffs, and other Statutes against Wardens; But no Action lyes against a Judge, for that which a Judge receives is Bribery and not Extortion, Et satis pæne est, judici quod Deum habeat ultorem, and therefore he said the party indicted ought to be discharged: Gawdy Justice, If in the Indictment there be words of Extortion or Bribery, although such an offence in a Judge be not materially Extortion, if these words contra pacem, &c. had been in the Indictment it had been good, quod Clench concessit: And afterwards the party was discharged.

Indictments.

CCCCV. Mich. 28, and 29: Eliz. In the Kings Bench;

Crisp and Goldings Case:

Assumpſit.

In an action upon the Case by Crisp against Golding, the Case was, That a Feme sole was Tenant for life, and made a Lease to the Plaintiff for five years, to begin after the death of Tenant for life, and afterwards the 18. of October made another Lease to the same Plaintiff for 21 years, to begin at Michaelmas next before; and declaring upon all the said matter, he said, *virtute cuius dimissionis*, i.e. the later Lease; the Plaintiff entered and was possessed craft. Fest. 5. Mich. which was before the Lease made, & further declared, that in consideration that the Plaintiff had assigned to the Defendant these 2 leases, the defendant promised &c. & upon non Assumpſit it was found for the Plaintiff and damages taxed 600. l. Coke argued for the Plaintiff against the Solicitor Generall, who had taken divers exceptions to the Declaration, i. Where two or many considerations are put in the Declaration, although that some be void, yet if one be good the action well lieth, and damages shall be taxed accordingly, and here the consideration that the Plaintiff should assign totum statum, titulum, & interesse suum quod habet in terra prædicta. 2. Exception, that the Lease in possession was made after Michaelmas, i. 18. October, and the Declaration is, *virtute cuius dimissionis*, the Defendant entered crastino Mich. and then he was a disseisor and could not assign his interest and right, which was suspended in the tortious disseisin, and so it appeared to the Judges, and he said there was not here any disseisin, although that the Lessee had entered before that the Lease was made; for there was an agreement, & communication before of such purposed and intended Lease, although it was not as yet effected, and if there were any assent or agreement that the Lessee should enter, it cannot be any disseisin, and here it appeareth that the Lease had his commencement before the making of the Lease, and before the entry: But put case it be a disseisin, yet he assigned all the Interest quod ipse tunc habuit, according to the words of the consideration, and he delivered both the Indentures of the said Demises, and quacunq; via datur, be the assignment good or void it is not materiall, as to the Action, for the consideration is good enough. Egerton Solicitor contrary. In every action upon the Case, upon Assumpſit, there ought to be a Consideration, promise, and breach of promise, and here in our Case the Consideration is, the assignment of a Lease, which is to begin after the death of the Lessor, who was but Tenant for life, which is meerly void, and that appeareth upon the Record, and as to the second part of the Consideration, and the Assignment of the second Lease, it appeareth, that the Plaintiff at the time had but a Right; for by his untimely entry before the making of the Lease, he was not to be said Lessee, but was a wrong doer, &c. in 19 Eliz. in the Kings Bench, this difference was taken by the Justices there, and delivered openly by the Lord Chief Justice, i. When in Action upon the Case, upon Assumpſit 2 Considerations or more are layd in the Declaration, but they are not collaterall, but pursuant, as A. is indebted to B. in 100 l. and A. promiseth to B. that in Consideration that he oweth him 100 l. and in consideration that B. shall give to A. 2 s. that he will pay to him the said 100 l. at such a day, if B. bring an action upon the Case, upon this Assumpſit, and declares upon these two promises, although the Consideration of the 2 s. be not performed, yet the Action doth well lie: But if they be collaterall considerations, which are not pursuant, as if I in consideration that you are of my Councell, and shall ride with me to York, promise to give to you 20 l. in this case all the considerations ought to be proved, otherwise the Action cannot

cannot be maintained: So in our case, the considerations are collaterall, and therefore they ought to be proved, and afterwards judgement was given for the Plaintiff.

Hill 28 and 29 Eliz. In the Common Pleas.

CCCCXLVI. Fooly and Prestons Case.

In an Action upon the Case, the Plaintiffe declared That whereas John Gibbon was bound unto the Plaintiff in quodam scripto obligatorio, sigillo suo sigillat. and coram, &c. recognito in forma Statuti Stapul. The Defendant in consideration that the Plaintiffe would deliver to him the said writing, to read over, promised to deliver the same again to the Plaintiff within six dayes after, or to pay to him 1000l. in lieu thereof, upon which promise the Plaintiffe did deliver to the Defendant the said writing, but the Defendant had not nor would not deliver it back to the Plaintiff, to the great delay of the Execution thereof, and the Defendant did demur in Law upon the Declaration; it was objected that here is no sufficient consideration appearing in the Declaration upon which a promise might be grounded, but it was the opinion of the whole Court, that the consideration set forth in the Declaration was good and sufficient, and by Anderson, it is usuall and frequent in the Kings Bench: if I deliver to you an Obligation to rebail unto me, I shall have an action upon the Case, without an expresse Assumpsit, and afterwards judgement was given for the Plaintiff.

Hill 28. and 29. Eliz. In the Common Pleas.

CCCCVII. Wallpool and Kings Case.

William Wallpool was bound to King by Recognizance in the summe of 400l. and King also was bound to Walpool in a Bond of 100l. Walpool according to the Custome of London, affirmed a Plaint of Debt in the Guildhall London against the said King, upon the said Bond of 100l. and attached the debt due by himself to Wallpool in his own hands, and now King sued Execution against the said Wallpool upon the said Recognizance, and Wallpool upon the matter of Attachment brought an Audita querela, and prayed allowance of it, and by Gawdy Serjeant, such a writ was allowed in such Case, 26 Eliz. Anderson at the first doubted of it, but at last the Court received the said writ de bene esse, and granted a Superfedeas in stay of the Execution, and a Scire facias against King, but ex lege, that Wallpool should find good and sufficient Sureties, that he would sue with effect, and if the matter be found against him, that he pay the Execution.

Attachmett
in London.

CCCCVIII. Hill 28. and 24. Eliz. In the Common Pleas.

A Copy holder with license of the Lord leased for years, and afterwards surrendered the Reversion with the Rent, to the use of a stranger, who is admitted accordingly. It was moved, if here need any Attozment, either to settle the Reversion, or to create a Privity, and Rhodes and Windham Justices were of opinion, that the surrender and admittance are in the nature of an Inrollment, and so amount to an attozment, or at least to supply the want of it.

Copyholder.
Surrender.

Morb. 28 Elix. In the common Pleas.

CCCCIX. Ruddall and Millers Case.

Devise.

Conditions.

In Trespasse, the Case was this, William Ruddall Serjeant at Law, 18 H. 8. made a Feoffment in Fee to diverse persons to the use of himselfe and his Heirs, and 21 H. 8. declared his Will, by which he devised his Lands to Charles his younger Son, and to the Heirs males of his body, the Remainder to John his eldest Son in Fee, upon condition, That if Charles or any of his Issue should discontinue or alien but only for to make a Joynture for their wives for terme of their lives, that then, &c. and dyed; The Statute of 27 H. 8. came, Charles made a Lease to the Defendants for their lives, according to the Statute of 32 H. 8. And leyed a fine with Proclamation, *Soc Conusans de droit come ceo*, &c. to the use of himselfe and his wife, and the Heirs Males of their two bodies begotten, the Remainder to himselfe and the Heirs Males of his body, the Remainder to the right Heirs of the Devis for, John the eldest Son entered for the Condition broken upon the Defendants, who re-entered, upon which Re-entry the Action was brought: *Cawdy, Fleetwood*, and *Shuckeworth* Serjeants, for the Plaintiffs: This Condition to restrain unlawfull discontinuance is good, as a Condition to restrain Waste, or Felony: See 10 H. 7. 11. 13 H. 7. 23. And before the Statute of *Quia Emptores terrarum*: If A had enfeoffed B upon Condition, That B nor his Heirs should alien, the same was a good Condition by *Fleetwood* (which was granted *per Curiam*) And this Condition was annexed to good purpose, for the Serjeant knew well, That *Cestuy que use* might have leyed a fine, or suffered a Recovery by the Statutes of 1 R. 3. 4 H. 7. And this Condition annexed or tyed to the use by the Will is now knit to the possession which is transferred to the use by the said Statute: Although it may be objected that the Condition was annexed to the use, and now the use is extinct in the possession, and by consequence the Condition annexed unjust, as where a Reversion is granted upon Condition, and afterwards the Tenant ceases, now the Reversion is extinct, and so the Condition annexed to it: But as to that, it may be answered, That our Case cannot be resembled to the Cases at common Law, but rests upon the Statute of 27 H. 8. *scilicet* *Cestuy que use*, shall stand and be sold, deemed and adjudged in lawful seisin, title and possession of and in such Lands to all intents, constructions, and purposes in Law, of and in such like estates as he had in the use, and that the estate, right, title, and possession that was in the feoffee shall be clearly deemed and adjudged to be in *Cestuy que use*, after, such quality, manner, forme, and condition as he had in the use: And therefore in the common assurance by bargain and sale by Deed enrolled, if such assurance be made upon Condition, As in case of *Portage*, the possession is not raised by the Bargainer, but by the Bargaine an use is raised to the Bargaine, and the possession executed to it by the Statute, and the Condition which was annexed to the use only is now consigned to the possession, and so it hath been adjudged: So if the Feoffees to use before the Statute, had made a Lease for life, the Lessee commits Waste, the Statute comes, now *Cestuy que use* which was, shall have an Action of Waste, as it was adjudged in Justice *Southcotes* Case: So a Title of *Cessavit* in the Feoffees shall be executed by the Statute. So if the King grants to the Feoffees in use, a *saire*, *Markot*, or *Warren*, these things shall be executed by the Statute, as it was holden in the Case of *Clarencius*: As to the Condition, They conceived, That it is broken, for where the Devis had allowed to the Devises to discontinue for life, to make a Joynture

Southcotes Case.

Clarencius Case.

Fornture to his Wife, now he hath exceeded his allowance, for he might have made a Fornture to his wife in-defeasible by fine upon a Grant upon a Reuder for life, &c. But this fine with the Proclamations is a Bar to the former entail which was created by the Devise, and hath created a new entail, and the former tail was barred by the fine against the intent of the Devise: Also by this fine he hath created a new Remainder, so as his Issue inheritable to this new entail, might alien and be unpunished, which was against the meaning of the Devise: And as to the Lease for lives to the Defendants, the same is not any breach of the Condition, for that is warranted by the Statute of 32 H. 8. which enables Tenant in tail to make such a lease, so as it cannot be said a Discontinuance, which Anderson and Periam granted: But the fine levied after is a breach of the Condition, and then the Re-entry upon the Lessees, who have their estates under the Condition is lawfull: As where the wife of the feoffee upon Condition is endowed, and afterwards the Condition is broken, now by the Re-entry of the feoffor, the Power is defeated: And Shuttleworth put this case, A feoffment is made upon Condition, That the feoffee shall lease the Lands to A for life, and afterwards grant the Reversion to B in fee, the feoffor may re-enter, for by this Conveyance he in the Reversion is immediate Tenant to the Lord, where by the intended assurance, the particular Tenant ought to be. Pockring, Fenner, and Walmesley contrary: And by Walmesley, By this devise the use only passeth, and not the Land it selfe, for the Statute of 1 R. 3. extends only to Ads executed in the life of Cestuy que use, and not to devises which are not executed till after the death of the Devise, which see 4 Ma. Dyer 143. Trivilians Case, See also 6 E. 6. Dyer, 74. The Lord Bourchiers Case, but 10 H. 7. Cestuy que use deviseth, That his Executors shall sell the Land, now by the sale of the Land in possession, for the same is in a manner an Ad in his life, for the Vendor is in by Cestuy que use, and here is a Condition. and not a Limitation, for the nature of a Condition is to draw back the estate to the feoffor, Donor, or Lessor, but a Limitation carryeth the estate further: And he conceived, That the Condition is not broken by this Ad, for the intent of the Devise is pursued, for his meaning was, That the wife should have a Fornture indefeasible against the Issue in tails, and that the inheritance should be preserved, That both should be observed; and he said, that this fine being levied by him in the Reversion upon an estate for life, is not any discontinuance, but yet shall bar the estate Tail. And the Justices were clear of opinion, that the Condition is broken, and also that the intent of the Condition is broken, for it might be, that Charls had issue by a former wife, which by this fine should be disinherited, and a new Entail set on foot against the meaning of the Devise, &c. and afterwards Judgement was given for the Plaintiffe.

Hill. 31. Eliz. rot. 355. In the Kings Bench.

CCCCX Simmes and Wescots Case.

In an Action upon the Case, the Plaintiffe declared, That in consideration, that he would marrie the Defendants Daughter, the Defendant promised, to give him 20 l. and also to procure him all the corn growing upon such Lands, and to provide necessaries for the wedding dinner, the Defendant did confesse the communication returned them, and that he promised to give the Plaintiffe 20 l. so as he would procure a Lease of certain Lands to his Daughter for her life, absque hoc, that he promised modo & forma: The Jury found the promise of the 20 l. but not any other thing, it was moved in arrest of Judgement, that the Assumpsit whereof the Plaintiffe hath declared,

declared, although it consist of others things, yet it is entire, and if the whole is not found, nothing is found; and the Case of 21 E. 4. 22. was cited touching variance of Contract, as where an action of Debt is brought upon a Contract of a horse, and the Jury find a Contract for two horses, the Plaintiff shall never have judgement; on the other side it was said, That the Plaintiff shall recover damages for the whole that is found; i. e. for the 201. See 32 H. 8. Br. Issue 90. In an action upon the Case, the Plaintiff declared, that the Defendant did promise to deliver four woollen cloaths, the Defendant pleaded, That he did promise to deliver four linnen cloaths, absque hoc, that he promised, &c. the Jury found, That the Defendant did promise to deliver two woollen cloaths, and the Plaintiff did recover damages for the two. So in Wast, the wast is assigned in succidendo 20 oaks, upon which they are at Issue, the Jury find but ten oaks, the Plaintiff shall have Judgement for so much, and shall be amerced for the residue, Gawdy Justice. Here are severall Assumpsits in Law, as Br. 3. Ma. Action surle Case 108. a man in consideration of a marriage assumes to pay 20 l. per annum for four years, two years incur, the party brings an action upon the case for the arrearages of the two years. Wray in an action upon the Case, the Plaintiff ought not to vary from his Case, as if a promise be grounded upon two considerations, and in an action upon it, the Plaintiff declares upon one onely, he shall never have Judgement, and here the Jury have not found the same promise. Clench, If promise be made to deliver a horse and a Cow, and the Horse is delivered, but not the Cow; the party shall have an Action for the Cow, but he shall declare upon the whole matter, and afterwards Judgement was given, quod querens nihil capiat per billam.

Regula.

Trin. 31. Eliz. In the Kings Bench.

CCCCXI. Stile and Millers Case.

A Parson Leased all his Glebe Lands for years, with all the profits and commodities, rendering 13 s. 4. d. pro omnibus exactionibus & demandis, and afterwards libelled in the Spiritual Court against his Lessees for the Tithes thereof, the Lessee obtained a Prohibition, See 32 H. 8. Br. Dis. 17. 8. E. 2. Avowry 212. Wray: Tithes are not things issuing out of Lands, nor any secular duty, but spirituall, and if the Parson doth release to his Parishioner all demands in his Lands, his Tithes thereby are not extinct, and afterwards a consultation was granted.

Tithes.

Trin. 31 Eliz. rot. 902. In the Kings Bench.

CCCCXII. Lee and Curetons Case.

IN Debt upon an Obligation, the Defendant pleaded non est factum, and it was found for the Plaintiff, and Judgement given, & afterwards the Defendant brought error, & assigned for error that the Declaration was per scriptum suum obligat. without saying, he in Curia prolat. to which it was answered by Coke, that the same was but matter of form which a judgement ought not to be reversed, for that the Clerk ought to put in without instruction of the party, and so it was holden in a case betwixt Barras and King, M. 29. and 30 Eliz. Another error was assigned, because the judgement is entered, de hinc nihil quia perdonat. where it should be quod capitatur, although the Pleas were pleaded after the generall parson, and for that cause the Judgement was

Debt.

Error.

was reversed, for if the pardon be not specially pleaded, the Court cannot take notice of it, as it was holden in Serjeant Harris Case.

Trin. 31 Eliz. In the Kings Bench.

CCCCXIII. Lacy and Fishers Case.

In a Replevin, the taking is supposed in S. which Land is holden of the Baron of Esthall, the Defendant made Conusans, as Bailiffe of the Lord of the Baron aforesaid, and issue was taken upon the Tenure, and it was tried by a Jury, out of the Visne of Esthall onely, Tanfield. Triall. The trial is not good, for the issue ought not to have been tried by both Visnes, S. and Esthall, for two things are in issue. If it be holden, or not. 2. If it be holden of the Baron of Esthall, for which cause the Visne ought to be from both places, and the opinion of the Court was, That for the manner of it, it was not good, as if an issue be joyned upon common for cause of vicinage, it shall be tried by both Tenures, See 39 H.6.31. by Littleton and Danby, and the case in 21 E.3.12. was cited in a per que servicia, the Baron was in one county, and the Lands holden in another county, the Tenant pleaded, that he did not hold of the Conusor, and that he was tried by a Jury of the county where the Land was, See 2 H.4. Gawdy denied the book cited of 21 E.3. to be Law, and the reason wherefore the Visne shall come from both places, is because it is most likely, that both the Visne may better know the truth of the matter, than the one onely. Another Exception was taken, because the Conusans (as it seems) is made according to the Statute of 21 H.8.19. and yet the party doth not pursue the said Statute through the whole Conusans: for by the Statute in Abowry or Conusans, the party needs not to name any person certain to be Tenant to the Land, &c. nor to make Abowry or Conusans upon any person certain; and now in this Conusans he hath not made Conusans upon any person certain, but yet he hath named a person certain to be Tenant, &c. and in as much as this Conusans is not made, either according to the Common Law, or according to the Statute, it cannot be good, but that Exception was disallowed by the Court, for if the Statute remedyeth two things, it remedyeth one, and the Conusans made in form as above, was well enough by the opinion of the whole Court.

Exposition of
Stat. 21 H.8.
cap. 19.

Trin. 31 Eliz. In the Kings Bench.

CCCCXIV. Dierlly and Nevels Case.

In an Action of Trespasse, the Defendant pleaded Non-guilty, and if he might give in evidence, That at the time of the Trespasse, the Freehold was to such an one, and he as his servant, and by his Commandement entered was the question; and it was said by Coke, That the same might so be well enough, and so it was adjudged in Trivilians Case; for if he by whose commandement he entreteth hath Right, at the same instant that the Defendant entreteth the Right is in the other, by reason whereof he is not guilty, as to the Plaintiff, and Judgement was given accordingly.

Mich. 29 and 30 Eliz. rot. 546. In the Kings Bench.

CCCCXV. *Savage and Knights Case.*

Error.

A writ of Error was brought upon a Judgement given in Leicester, in Debt. Tanfield assigned for Error, because in that suit there was not any Plaint, for in all inferior Courts, the Plaint is as the Originall at the Common Law, and without that no Proccesse can issue, and here upon this Record nothing is entred, but onely that the Defendant summonitus sit, &c. and the first Entrie ought to be, A.B. queritur versus C &c. Clench Justice, a Plaint ought to be entred before Proccesse issuech forth, and this Summons which is entred here, is not any Plaint, and for that Cause the Judgement was reversed.

Trin. 31 Eliz. In the Kings Bench.

CCCCXVI. *Rawlins Case.*

In Trespasse for breaking his Close by Rawlins, with a continuando. It was moved by Coke, that the Plaintiffe needed not to shew a Regresse to have Damages for the continuance of the first Entry, scil. for the mean profits, and that appears by common experience at this day, Gawdy Justice, whatsoever the experience be, I well know that our books are contrary, and that without an Entry he shall not have damages for the continuance, if not in case where the Term or estate of the Plaintiffe in the Land be determined, and to such opinion of Gawdy, the whole Court did incline, but they did not resolve the point, because a Regresse was proved, See 20 H. 6. 15. 38. H. 6. 27.

Trin. 31 Eliz. In the King Bench.

CCCCXVII. *Harris and Bakers Case.*

Accompt.

Dammages.

Collet and Andrews Case.

In an accompt dammages was given by the Jury, and it was moved that dammages ought not to have been given by way of dammages, but the dammages of the Plaintiffe shall be considered by way of Arrearages, but see the Case, H. 29 Eliz. in the common Pleas, betwixt Collet and Andrews, and see 10 H. 6. 18. In Accompt the Plaintiffe shall count to his damage, but shall not recover dammages, vide 2. H. 7. 13. 21 H. 6. 26. The Plaintiffe shall not recover dammages expressly, but the Court shall adde quoddam incrementum to the Arrearages, Coke, It hath been adjudged, that the Plaintiffe shall recover dammages ratione implicationis, non Retentionis.

CCCCXVIII. *Mich. 32 Eliz. In the Kings Bench.*

The words of the Statute of 32 H. 8. cap. 37 of Rents are, that the Executors of a Grantee. of a Rent-charge may distrain for the arrearages of the said Rent incurred in the life of the Testator, so long as the Land charged doth continue in the Seisin or possession of the Tenant in Demesne, who ought immediately to have paid the said Rent so bebind to the Testator in his life, or in the Seisin or possession of any other person or persons

sons claiming the said Lands priely by and from the said Tenant, by Par-
chase, Gift, or Wicent, in like manner as the Tenant might or ought to
have done in his life time. And now it was moved to the Court. If A
grant a Rent charge to B the Rent is behind, B dyeth, A infeoffeth C of the
Lands in fee, who divers years after infeoffeth D, who divers years after
infeoffeth E. It was holden by Walmesey, Periam, and Windham Justice,
against Anderson Lord chief Justice, that E. should be chargeable with the
said arrearsages to the Executors of A, but they all agreed, That the Lord by
Escheat, Tenant in Dower, or by the courtessie, should not be charged, for
they do not claim in by the party onely, but also by the Law.

See before.

Hall. 32 Eliz. In the Common Pleas

CCCCXIX. Wigot and Clerks Case.

In a Writ of Right by Wigot against Clark for the Pannoz of D in
the County of Gloucester, the four Knights gladiis cincti did appear, and
took their corporall Oath, that they would choose 12, &c. ad faciendum mag-
nam Assisam, and by direction of the court they withzewe themselves into
the Exchequer chamber, and there did return in Parchment the names of
the Recognitoz, and also their own names, and at the day of the Return of
the Pannell by them made, the 4 Knights and 12 others were sworn to tell
the issue, and it was ordered by the court, That both the parties, scil.
the Demandant and the Tenant, or their Attornies, attend the said 4
Knights in the Exchequer chamber, and to be present at the making of the
Pannell, so as each of them might have their challenges, for after the return
of the Pannell, no challenge lieth, and thereupon the said 4 Knights went
from the Bar, and within a short time after, sitting the court, they return
ned the Pannell written in Parchment, in this tenor, Nominis Recognito-
rum, &c. inter A. petentem, & B. tenentem, and to set down their names, six
other Knights, ten Esquires, and four Gentlemen, and the Justices did
commend them for their good and sufficient Pannell, and thereupon a Venire
facias was awarded against the said parties.

Vrit of
Right.

Trin. 30 Eliz. rot. 611. In the common Pleas.

CCCEVXX Fory and Allens Case.

The case was, That Lessee for 30 years, leased for 19 years, and then
the first Lessee, and one B by Articles in writing made betwixt them,
did conclude and agree, That the Lessee for 19 years should have a Lease
for three years in the said Lands and others and that the same should not be
any Surrender of his first Term, to which Articles the said Lessee for 19
years did after agree and assent unto, and it was the opinion of all the Just-
ices of the court, that the same was not any Surrender, and they also were of
opinion, That one Term could not Surrender to another Term.

Surrender.

Trin. 31 Eliz. rot. 321 In the common Pleas.

CCCCXXI. Glanvil and Mallarys Case.

Glanvil was Plaintiff in Audita Querela, against Mallary upon a Sta-
ple, for that the connex was withzewe at the time of the
making of it, it was moved for the Defendant, that the court ought not
to

Audita Querela

to

Loves Case.
Dudley and
Skinners Case

to hold Plea of this matter, because there was no Record of the Statute remaining here, and therefore by Law he was compellable to answer it, &c. and a Precedent was shewed 5 H.8. where such a pleading was allowed, and judgement given, that the Defendant eat fine die, vide 16 Eliz. Dier 332. But on the other side divers precedents were shewed, that divers such Writs had been shewed in the common pleas, as 30 Eliz. Loves case, and the 1000 Dudley and Skinners case, and thereupon it was adjudged that the Action did well lye in this court.

Mich. 32 Eliz. In the common Pleas.

CCCCXXII. Pet and Callys Case.

Debt.

In Debt upon a Bond for performance of covenants the case was, I S by In-
venture covenanted with I D that such a woman, viz. R. S. at all times at the
request and charges of I. D. should make, execute, and suffer such reason-
able assurances of such Lands to the said I D or his heirs as the said I. D. or his
heirs should reasonably devise or require, I D devised a fine to be levied by
the said Woman, and required her to come before the Justices of assize
to acknowledge it, and the woman came before the said Justice to that intent,
and because the said woman at that time was not compos mentis, the said Jus-
tice did refuse to take the Consens of the said fine, & this was averred in
pleading in an action brought upon the said Bond for performance of Cove-
nants, where the breach was assigned in the not acknowledging of the said
fine, and upon the speciall matter the party did demur in Law, and the
opinion of the whole Court was, that the condition was not broken, for the
words are general to make such reasonable assurances which, &c. but if the
words had been speciall to acknowledge a fine, there if the Justice both re-
fuse to take such acknowledgement, the Bond is forfeited, for the party hath
taken upon him that it should be done.

Mich. 22 Eliz. In the common Pleas.

Wangford and Sextons Case.

Executions.

The Plaintiff had recovered against the Defendant in an action of Debt
and had execution: The Defendant after the day of the Teste of the
Fieri facias, and before the Sheriffe had meddled with the execution of the
Writ, bona fide for money sold certain goods and chattels, and delivered
them to the buyers; it was holden by the Court, that notwithstanding the
said Sale, that the Sheriffe might do execution of those goods in the hands of
the buyers, for that they are liable to the execution, and execution once grant-
ed or made shall have relation to the Test. of the Writ.

Trin. 29 Eliz. 101. 3715. In the common Pleas.

CCCCXXIV. Wilmer and Oldfields Case.

Award.

In Debt upon a Bond, the Condition was to perform the Award of I S &c.
The Arbitrators make Award, That the Defendant before such a day shall
pay to the Plaintiff 1000l. or otherwise procure one A. being a stranger to the
Bond to be bound to the Obligee for the payment of 12 l. per annum to the
plaintiff for his life, the Defendant pleaded the performance of the Award
generally

generally, the Plaintiff assigned the breach of the award in this, That the said A had not paid the said 100 l. without speaking of the cause of the award of the 12 l. per annum, upon which the Defendant did demur in law; it was holden by the whole Court, that the Replication was good, for the Award, as to the second point was meere void, as if no such Award at all had been, because A was a stranger to the Award and the submission, but as to the point of the 100 l. the same is good, and shall bind the parties, and the plaintiffe had Judgement to recover, vide 21 E.4.75.18 E.4.22,23.

Mich. 31, and 32: Eliz:rot. 814. In the common pleas.

CCCCXXV. Fabian and Windsors Case.

In Trespas for entring into his house of Anne at Uxbridge, it was found by Imperial verdict, That the plaintiff leased to the Defendant the said house for ^{Lease.} seven years, rendering Rent at the Feasts of the Annunciation of our Lady and Saint Michael, &c. with condition, that if the said Rent shall be behind by the space of ten dayes, &c. that it shall be lawfull to the Lessor to re-enter: And afterwards at the Feast of the Annunciation, 31 Eliz. the Rent was behind, and the tenth day after the Lessor came to the said House a quarter of an houre before the sun setting and demanded the rent in these words, I demand three pound ten shillings for a halfe years rent of this House now due, and there continued untill the sun was set, but no rent was paid: But note, that the Issue was, If he came to the House halfe an houre before sun set, and there continued demanding the halfe years rent of the Premises due at the Feast of the Annunciation of our Lady then last past: It was moved by Fenner, That upon this Verdict the Issue is not found for the Plaintiff, i. the Issue was upon the halfe houre, & the quarter part of the houre was found, 2. the Issue was, If the demand were of the Rent due at the Feast of the Annunciation passed, and the Verdict is for rent due at the time of the demand, &c. And it was the opinion of Anderson, Periam; and Walmesley, ^{Demand of Rent.} That as to the first point the Verdict was good enough for the Plaintiff: Windham contrary: But it was agreed by them all, That if in demand of rent (as supra) the Lessor, or any on his part both demand one penny more or lesse then is due, or in his demand both not shew the certainty of the rent, and the day of payment of it, and when it was due, the demand is not good, for a condition which goes in defeazance of an estate is odious in Law, and no re-entry in such Case shall be given, unless the demand be precisely and strictly followed. ^{Conditions taken strictly.}

Mich. 32: Eliz. in the common Pleas.

CCCCXXV. Elmes and Medcalfes Case.

It was holden for Law by the whole Court, That if one of the witnesses after the Jury are departed from the Bar, both repeat unto the Jury the same Evidence which he gave before and no more, That that doth make the Verdict to be void.

Atich. 32 & 33 *Eliz.* In the common Pleas.

CCCCXXVII. Carter and Claycoles Case.

Leases.

In Ejectione firmæ by Carter against Claycole, the Plaintiff declared upon a Lease made by the Wardens and Fellows of All-soules Colledge, 1. July, 10 *Eliz.* And it was found by Speciall Verdict, That Overden Warden of the said Colledge, and the Fellows, &c. leased unto the Plaintiff, To have and to hold from the Feast of the Annunciation next following, to the end of twenty years, and made a letter of Attorney to one, to enter into the said Banno, and to seal and deliver the Deed of the said Lease in their names to the Plaintiff, who by force thereof entered into part of the demised Premises, and there did seal and deliver the same, &c. But it was not found that any rent was reserved thereupon. And if this Lease were good; When the Jury found for the Plaintiff, but if not, then for the Defendant: Cooper Serjeant, It hath been objected, That this Lease being but for twenty years, is not warranted by the Statute of 13 *Eliz.* Cap. 10. For the words of the Statute are, Other then for the term of 21. years, as to that, It was not the intent of the Statute, but only to abridge the great and long Leases heretofore made by Colleges, and to limit such Leases to a certain measure of time, ut supra, for twenty one years or three lives, & non ultra, but on this score as much as they would, which was granted by the whole Court: Another matter was because it is not found, That the due rent was reserved upon the said Lease (acresuined yearly rent or more) and yet the same is good enough, for if the other party will take advantage of such defect he ought to shew the same, otherwise it shall be intender, because it is found that such Lease was made, that it was made according to the Statute: For if a man is to give title to himselfe by a conditionall Lease, he is not to plead the condition, but only the Lease; and if the other party will defeat the Lease by the Condition, he shall shew the same. And in this Case, The Defendant also ought to have shewed the Statute, by which such defective Leases are made void: Also it hath been objected, That by the Statute of 18 *Eliz.* the third part of the feut ought to be reserved in Cotte, and here is not found any Cotte, as to that, It is to be considered, That the said Statute is not a generall Law, whereof the Judges are bounden to take notice, but it ought to be pleaded, for it extends but to foure places, viz. Cambridge, Oxford, Winchester, and Eton, and therefore such a Statute ought to be pleaded, or given in Evidence, and found by Verdict: As where a man pleads a generall pardon, in which divers persons are excepted, he ought to plead it specially, and shew, that he is not any of the persons excepted, 8 E. 4. 7. 28 H. 7. So speciall customes ought to be pleaded, Cabelkind, Borough, English, 21 E. 4. 55. 36. The King grants to the Cittizens of Norwich, &c. And afterwards by act of Parliament, all their Liberties, &c. are confirmed by a generall confirmation to all Cities and Boroughs, this is a speciall act, and ought to be pleaded, by Brian, 59. 13 E. 4. 8. The Lord Sales case, an act of Parliament, That all Corporations made by the King, H. 6. shall be void, is a speciall act, and ought to be pleaded: And see 28 H. 8. 47. & 28. Dyer. If the Statute of 21 H. 8. cap. 13 Of Lands taken to ferme by Ecclesiasticall persons by a speciall Law: Yelverton contrary; The Statute of 13 *Eliz.* is a speciall Law and ought to be pleaded, but the Statute of 13 *Eliz.* is a generall Law which now see Hollands case, 29 *Eliz.* and Dampsons case, 45 *Eliz.* And this act of 13 *Eliz.* is generall in respect of time, for it extendeth to all time after (from henceforth) and to all persons to whom such Leases shall be made; the words of the Statute are, scil. To any person or persons

Speciall Statutes ought to be pleaded.

persons, in respect of persons who shall lease, all spiritiual persons: Gene-
rall in respect of the end, which is the maintenance of learning, which extends
to the common profit, &c. Drew Serjeant, That this act of 23 Eliz. is ge-
nerall in respect of restraint only, but extends only to spiritiual persons, and
therefore ought to be pleaded, for otherwise the Court shall not take notice of
it: As the Statute of 23 H. 6. of Sheriffs ought to be pleaded, which see in
the Case of Dive and Manningham, Plowden, 64, 65. And although the Sta-
tute ought not to be pleaded, Yet this Lease is not void against the War-
den who made it, but against his Successor, although no rent be reserved up-
on it, notwithstanding that the percell of the Statute be utterly void, and
of none effect, to all intents, constructions, and purposes: So upon the Sta-
tute of 1 Eliz. concerning Leases made by Bishops, the Law hath been so ta-
ken in the case of the Bishop of Coventry and Leichfield upon a Grant of the
next Advowance, That although it doth not bind the Successors, yet it shall
bind the Grantor himselfe: So here this Lease being made by the present
Warden and Fellowes of the Colledge aforesaid, although it be not suffici-
ent to bind the Successor, yet it shall bind the Warden who made the Lease,
Puckering contrary, And as to the case of 13 E. 4. 8. the reason there is, be-
cause there is an Exception in the said Statute of others Grants made by
King H. 6. and therefore the said Act ought to be specially pleaded: And see
34 H. 6. 34. by Priour: But in this Act of 13 Eliz. there is not any Excep-
tion, and although it be a generall Act with a Restraint, yet such an Act
ought not to be pleaded, and therefore 27 H. 8. 23. In an action upon the Sta-
tute of 21 H. 8. for taking of Lands to Farme by spiritiual persons, he need
not make mention of the Statute: And afterwards the Justices did advise
upon this point, whether the Lease be so void, That it be void against a stran-
ger: So as the Defendant who doth not claime under the Colledge, and who
hath no title to the Land may avoid it. And Periam Justice denyed the
Case put by Puckering: A mortgage Lands in B upon a usurious contract
for one hundred pounds, and before the day of payment B is outted by C, a-
gainst whom B brings an Action, C cannot plead the Statute of Usury, for he
hath no title: For the estate is void against the Mortgagee. Another Ex-
ception was taken to the Declaration, because the Plaintiff hath declared,
upon a Lease by the Warden and Fellowes, without naming any name of the
Warden, 13 E. 4. 8. 18 E. 4. 8. In Trespasse the Defendant doth justify,
because that the Freehold was in the Dean and Chapter, and he as Servant,
and by their commandment entred: And Exception was taken to that
Plea, because he hath not shewed the name of the Dean, scil. the proper
name: So if a Lease be made by Dean and Chapter in these words, Nos
Decan. & Capituli, the same Lease is void, which was granted by the Court
and 12 H. 4. 251. A Provoost granted an Annuity by the name of Provoost of
such a Colledge, without any name of Baptisme, and afterwards, the Gran-
tee brought a Writ of Annuity against the Successor of the said Provoost,
and by Hull, The Writ is well enough, but the Christian name ought to be
set down in the Writ: So here, because that the name of Baptisme of the
Warden is not in the Declaration, the same is not good: But the opinion of
the whole Court was, That the Declaration is good enough, and they did re-
lye especially upon the Book of 21 E. 4. 15. 16. Where Debt is brought by
the Dean and Chapter without any Christian name, and the Writ holden
good: Anderson: It stands with reason, That for as much as the Colledge
was incorporated by the name of Warden and Fellowes, and not by any
Christian name that they may purchase, and lease by such name without any
Christian name, and may be impleaded, and implead others by such name,
and as the Fellowes in such case need not to be named by their Christian
names, no more ought the Warden: But of a Parson, Vicar, Chantry
Priest, it is otherwise, for in such case the name of Baptisme ought to be ad-

ded: It was also objected, That because the Letter of Attorney was to enter in the Mannor, and all the Lands and Tenements of the Colledge in such a Towne, and to seal the Indenture of Lease in the name of the Lessors, and to deliver it to the Plaintiff as their Deed, now the Attorney in executing of this Warrant hath not pursued it, for he hath only entred into the Lands, but it is not found, that he entred into the Mannor, and so the Lease is void: And it was said by Puckering, That if I lease two Acres in two severall Counties, rendering for the one Acre ten shillings, and for the other Acre ten shillings, and make a Letter of Attorney to make Libery in both, if the Attorney entred into one Acre, and makes Libery, the same is void, for the Attorney hath not pursued his authority, for peradventure I would not have leased the Acre whereof Libery is made for such rent of ten shillings, being perhaps of greater value, but with the other Acre which was of lesser value, and so the mis-executing of my warrant shall preiudice me: Windham, Perhaps if one entire Rent had been reserved out of both Acres, it may be that by the Libery in one Acre, all is void: But by Puckering one entire Rent cannot be reserved upon such a Lease of two Acres in severall Counties: Walmesley denied the Case put by Puckering, for the authority is executed well enough, for it doth not appeare upon the Verdict, but that the Colledge was in possession at the time of the Lease made, and then there needed not any such Entry, but the bare sealing and delivery of the Attorney is good enough: And also it doth not appeare by Verdict, That the Colledge hath any Mannor, and therefore, it shall be so intended, and then the case is no other but that, A man leaseth a Mannor, and certain Lands in D, and makes a Letter of Attorney to make Libery of them, where he hath nothing in the Mannor, and the Attorney makes Libery of the Land without meddling with the Mannor, the same is a good Libery, and the authority duely executed: But if it had been expressely found, that the Colledge had such a Mannor there, then the Entry in the Land only, without meddling with the Mannor, and the Libery made accordingly should not be good: But yet afterwards he seemed to be of other opinion. And as to that which hath been objected, That the Lease is void to all intents and purposes according to the words of the Statute (for by some it cannot be resembled to the case cited before, of the Bishop of Coventry and Leichfield, that such a Grant should bind him and not his Successors) for if this Grant in our Case shall not be void presently, it shall never be void, for the Colledge never dyeth, no more then Dean and Chapter, Priory & Commonalty: to that it was answered by Drew, That although there be some difference betwixt such Corporations, & that the words of the Statute are general (void to all intents, constructions, & purposes) yet they shall be construed according to the meaning of the makers of the Act, whose scope was to provide for the Successors, and not for the present Incumbent, and to the utter impoverishing of all Successors, without any respect to the party himself, as it appeareth by the preamble of the said Statute, where it is observed, That by long and unreasonable Leases, the decay of spirituall livings is procured, for the remedying, and preventing of which long Leases this Act was made, and that the Successors should not be bound thereby: And these Leases are not void, simpliciter sed secundum quid, i. e. as to the Successors: As upon the Statute of 11 H. 7. cap. 20. Discontinuances made by women, &c. shall be void and of none effect, yet such a Discontinuance made is good against the woman her selfe: So upon the Statute of 1 Eliz. concerning Bishops; See now Coke, Lincolne Colledge Case, 37 Eliz. in the three Reports, 60. A Lease made by Dean and Chapter not warranted by the said Statute, shall not be void untill after the death of the Dean who was party to the Lease: So upon the Statute of 13 Eliz. of fraudulent Conveyances, such fraudulent Conveyance is not void against the Grantor, but against those who are provided for by the said Statute, and that the Lease in the principall case is not void but

but voidable, all the Justices agreed to be avoided by the Colledge, or any other who claim by it, and by Anderson, if such a Lease should be void, then great mischief would fall to the Colledge for whose benefit this Statute was made, for if such Lease be made rendering a small Rent, then if before the defect be found or eschewed, the Rent was arrear, the Colledge could not have remedy for the said Rent: Also by Periam, such a Lessee might have an Action of Trespass against a stranger, who entrench upon the Land, which proves that the Lease is not void, but voidable, and afterwards notwithstanding all the Objections, Judgement was given for the plaintiffe, and the chief authority, which moved Periam Justice to be of such opinion, was *Le-mans case* cited before, 28 H.8. Dyer 27. where a Lease was made to a spiritual person against the Statute of 21 H.8. and a Bond or Obligation for performance of covenants, and thereupon an Action was brought, and the plaintiff therein had Judgement and recovered, which could not have been if the Lease were utterly void against the Lessor and Lessee, as the very words of the Statute are, and although it is not alledged in the book, that that was any cause of the Judgement, yet in his opinion it was the greatest cause of the Judgement in that case.

Pasch. 35 Eliz. In the common pleas.

CCCCXXVIII. Bighton and Sawles Case.

In an Action upon the case, it was agreed by the whole Court, That where Judgement is given, that the plaintiff shall recover, and because it is not known what damages, therefore a writ issueth to enquire of the damages, That the same is not a perfect Judgement before the damages returned and adjudged, and therefore they also agreed, that after such award, before the damages adjudged that any matter might be shewed in Court in arrest of the Judgement, and by Periam Justice, the difference is, where damages are the principall thing to be recovered, and where not; for if damages be the principall, then the full Judgement is not given until they be returned, but in Debt where a certain sum is demanded it is otherwise.

Pasch. 33 Eliz. In the common Pleas.

CCCCXXIX. Maidwell and Andrews Case.

Maidwell brought an Action of Covenant against Andrews, and the Case was this, That R. was seised of Lands, and leased the same for life, rendering Rent; and afterwards devised the Reversion to his wife for life, and died, Andrews the Defendant took to wife the wife of the Devisor, the Devisee of the Reversion, afterwards Andrews bargained and sold the said Reversion to one Marland and his heirs during his own life, and afterwards granted the Rent to the Plaintiffe, and covenanted that the plaintiffe should enjoy the said Rent during his Term, absque aliquo legitimo impedimento of the said Andrews his Heirs or assigns, or any other person, claiming from the said Marland. Marland died seised, and the same descended to B. his heir, and the breach of the Covenant was assigned, in this, i. in the heir of Marland, who hath the Rent by reason of the Grant of the Reversion to Marland ut supra, the Defendant pleaded the Grant of the Reversion to Marland, per scriptum (without saying, Sigillo suo sigillat. & hic in Curia prolata.) absque hoc, that the said Reversion and Rent descended to B. and thereupon the plaintiffe did demur in Law, and the causes of the Demurrer were assigned by Yelverton Serjeant. 1. The Grant of the Reversion is

Traverse.

Vernon and
Graves Case.

is pleaded per scriptum, and he doth not say (sigillat.) for a Reversion cannot pass without Deeds, although it be granted but for years, and a bare writing is not a Deed without sealing of it, and therefore the pleading ought to be per scriptum suum sigillat. or per scriptum suum, for scriptum suum implies the sealing and delivery. 2. It ought to be pleaded in Cur. probat. for the Court is to see such Deeds, to the end they may know, if it be a lawfull Deed, without resort, to anything or other defects. 3. The Defendant hath traversed the Descent, where he ought to have traversed the dying seised, for of every thing descendable, the dying seised is the substance, and the Descent is but the effect: And although the Grant of the Reversion was but for the life of the Grantor, yet the estate granted is descendable, as 27 E.3.31. Tenant by the Curtesie leaseth his estate to one and his heirs, the Grantor dieth, his Heir entred, and a good Bar against him in the Reversion, and see 14 E.3. Action 36. Annuity granted to one and his Heirs for the term of another mans life, the Grantor dieth, living Cestuy que use, the Heir of the Grantor brings a writ of annuity, and it was holden maintainable, and he saith, that where the dying seised is confessed and avoided by the other side, there the Descent is traversable, and not the dying seised, and that was the Case betwixt Vernon and Gray. In an Abolmoye Vernon conveyed the Land from the Lord Powes, to him as next Heir to him, because the Lord Powes died seised in his Demesne as of fee without issue, and the Plaintiff conveyed from the said Lord Powes by Devis, and traversed the Descent to the Abolmant, for the dying seised was confessed and avoided by the Devis, 21 Eliz. Dyer 366. See 21 H.7.31. In Trespasse the Defendant saith, That I was seised, and dyed seised, and that the Land descended to him as Son and Heir, and that he entred, the Plaintiff saith That I was seised, and took to wife K, and they had issue the Plaintiff, and dyed seised, and the Land descended to him, and traversed the Descent to the Defendant, and see Sir William Merings Case, 14 H.8.22, 23. But if the parties do not claim by one and the same person, or the dying seised be not confessed and avoided, there the dying seised shall be traversed, and not the Descent. Glanvil Serjeant, Be the Bar insufficient or not, if the Declaration be not sufficient, the Plaintiff shall not have Judgement, and here is not any breach of Covenant, viz. that the Plaintiff shall enjoy it, without any lawfull impediment of the Defendant, his Heirs or Assignes, or any claiming by Marland, and then if the Heir of Marland cannot make any lawfull claim, then there is not any breach of Covenant assigned, and he saith because it is not shewed, that the Land is not holden in Dorage, the Devis is not good, for it may be that the Land is holden in Capite: but admit the Devis good, that when Andrews bargains and sells unto Marland, and the Tenant never returns, then nothing passeth, and then the Heir of Marland cannot make any lawfull claim or lawfull impediment. Periam Justice, Here Marland was assignee of Andrews, and if he or his Heir make claim, although that the assignment be not sufficient in Law, yet because he hath colour by this assignment. his claim is lawfull, and so there is a breach of the Covenant, and although it is not alledged, that the Land devised, is holden in Dorage, yet the Devis is good for two parts of the Land. Anderson Justice, If it be good but for two parts, then is the Reversion appoynted, & the Rent destroyed, and so Marland hath not any Rent by his purchase of the Reversion, and so he cannot lawfully disturb the Plaintiff, the Law doth create his appoyntment, which grows by the Devis, and therefore the Rent shall not be destroyed, but if it had been done by the Act of the party, it had been otherwise, and I would willingly hear, if the Heir of Marland be assignee of Andrews, for otherwise he is not within the words of the Covenant, for Marland hath an estate to him and his Heirs for the life of another: now after the death of Marland, his Heir is a special occupant, and

vi. H. 26 Eliz. Rot. 560. in the Common Pleas, such an Heire shall not have his age.

Pasch. 33 Eliz. In the common Pleas.

CCCCXXX. Oglethorpe and Hides Case.

In Debt upon a Bond for the performance of Covenants, it was holden by the whole Court, That if the Defendant pleaded generally, the performance of the Covenants, and the Plaintiff doth demur generally upon it without shewing cause of Demurrer; Judgement shall be given according to the truth of the cause, for that default in pleading is but matter of forme, and is aided by the Statute of 27 Eliz. But if any of the Covenants be in the disjunctive, so as it is in the Election of the Covenantor to doe the one or the other, then it ought to be specially pleaded, and the performance of it, for otherwise, the Court cannot know what part hath been performed.

Mich. 32 Eliz. In the common Pleas.

CCCCXXXI. Tracy and Ives Case.

In Dowry by Margaret Tracy against Ives, the Case was, That John Finch was seised and enfeoffed Shipton and others of two parts of the Lands to the use of himselfe and the Defendant his then wife, and their heirs for ever, with Condition, That if his said wife did surtise him, she should pay such sums of money not exceeding two hundred pounds, to such persons which the Feoffor by his last will should appoint, and afterwards he declared his Will, and thereby appointed certain summs of money to be paid to divers persons, amounting in the whole to the sum of one hundred and fifty one pounds, and by his said Will devised the residue of his Lands to divers of his kindred, having no issue, and died. The wife married Tracy, and they brought Dowry against the Devisees, who pleaded the Feoffment aforesaid, and averred the same was made for the Joynture of the Demandant; And because that no other matter or circumstance was proved to verifie the Averment, the Court incited the Jury to find for the Demandant, which they did accordingly.

Mich. 32 Eliz. In the Common Pleas.

CCCCXXXII. Bond and Richardsons Case.

In Debt upon a Bond, the Condition was to pay a lesser sum such a day, and at such a place, the Defendant pleaded payment according to the Condition, upon which they were at issue; And it was found by Verdict, That the lesser sum was paid such a day before the day contained in the Condition of the Bond, and then received, and upon this Verdict Judgement was given for the Plaintiff, for the day is not materiall, nor the place, but the payment is the substance.

Trin. 32 Eliz. In the common Pleas.

CCCCXXXIII. Marshes Case.

Trower and
Conversion.

Goods came to a feme covert by Trober, and she and her Husband did convert them to their own use, it was holden per Curiam, That the Action upon the Case, shall be brought against the Husband & Wife, and not against the Husband only, for the Action doth sound in Trespasse, and it is not like unto Detinue, for upon a Detainer by the Wife, the Action lyeth against the Husband only.

Trin. 32 Eliz. In the common Pleas.

CCCCXXXIV. Corbets Case.

Debt.

Pleinment
Administred.

An Action of Debt was brought by Originall Writ against an Administrator in another County, then where the Administrator was commorant, and before notice of the suit, he paid divers debts of the Intestate due by specialty, and so he had not Assets to pay the debt in demand, having Assets at the day of the Teste of the Originall; And now, the Defendant appearing, pleaded this speciall matter, and concluded, so he had nothing remaining in his hands: And it was holden per Curiam, to be a good Plea, See 2 H. 4. 21. 22.

Mich. 32 Eliz. In the common Pleas.

CCCCXXXV. Gillam and Lovelaces Case.

Administra-
tion.

Katharine Gillam, Administratrix of John Gillam brought Ejectione firmæ against Leonard Lovelace, and upon not guilty pleaded, It was found for the Plaintiff; It was moved for the Defendant in arrest of Judgement, That the Declaration was not good because the granting of Letters of Administration is set forth in this manner, viz. Administratio commissa fuit Querenti per Willielmum Lewen Vicarium generalem in spiritualibus Epi. Rot. without averring, that at the time of the granting of the Letters of Administration, the Bishop was in remotis agendis, for a Bishop present in England cannot have Vicarium: But as to that, It was said by the whole Court, That the Vicar generall in spiritualibus, amounts to a Chancelor, for in truth the Chancelor is Vicar generall to the Bishop: Another Exception was, because the Declaration is not Epi. Rot. loci illius ordinarij, but that was not allowed, for all the Presidents, and the course of the Court is, That by way of Declaration such allegation needs not, but by way of Bar it is necessary: Another Exception was taken, because the Plaintiff hath declared of an Ejectment, and also, quod bona & catalla ibidem invent. cepit, &c. And here, in the Verdict, the damages, as well for the Ejectment, as for the Goods and Chattells, are entirly taxed: It was adjourned.

Mich. 32. Eliz. In the common Pleas.

CCCCXXXVI. Greeves Case.

In a Replevin, the Defendant made Conulsans of Bayliff to one Greeves and Rockwood, &c. and said, That A was seised of the Lands, and 6 Eliz. Replevin; enfeoffed certain persons in fee to the use of his last Will, by which he willed, that his feoffees should stand seised of the said Lands, untill the said Greeves Devise. had leyed of the profits of the said Lands, the sum of one hundred pounds: It was objected against this Conulsans, that here is no devise, for A at the time of the devise had not any feoffees, but the Exception was disallowed by the Court: And they cited the case of 15 Eliz. Dyer, 323. Lingers case, A made a feoffment in fee to his use, and afterwards devised that his feoffees should be seised to the use of his Daughter, that the same was a good devise of the Land: See 29 H. 8. Br. Devises, 48.

Mich. 31 & 32 Eliz. In the common Pleas.

CCCCXXXVII. Kempton and Coopers Case.

In Trespasse for breaking of his Close, the Defendant pleaded, that before this he had brought an Ejectione firmæ against the now Plaintiff and recovered, and had execution, &c. Judgment if Action, &c. And by Periam, Windham and Anderson Justices, the same is a good Bar, and the conclusion of the Plea is also good, Judgment if Action, without relying upon the Estoppel. Barr.

Mich. 32. Eliz. In the Kings Bench.

CCCCXXXVIII. Leigh and Okeley and Christmas Case.

Oliver Leigh Hermoz of the Queen of a Wood called Meerherk Wood in Warpleiden in the County of Surrey, brought an Action of Trespasse against Henry Okeley and Robert Christmas for breaking of the said Wood, and therein entering and cutting down of two hundred loads of Wood, and carrying away the same, &c. The Defendants pleaded, And before the time in which the Trespasse was supposed, &c. That King H. 8. was seised of the Mannor of Warpleiden, whereof the said Wood was parcell of which Mannor a Close called Withybod containing eleven Acres, eidem bosco adjacent. Custom; was parcell, and that the said Wood is, and time out of mind, &c. was closed and separated with Hedges and Ditches, from the said eleven Acres which said Hedge and Ditches, per totum tempus prædict. fuerunt & adhuc sunt prædict. bosco spectant. & pertinent. And that the said eleven Acres are, and time out of mind were customary Lands parcell of the Mannor also said, and demised and demisable in Fee-simple; And that the said King H. 8. at a Court holden, 38 H. 8. by his Steward demised the said eleven Acres by copy, to John Goring and his Heirs, and that within the said Mannor there is this Custome, That every Copyholder, Tenant of the said eleven Acres, &c. have used and accustomed, per se vel servientes suos per eorum præcept. succidere, capere, & asportare subboscum in prædict. bosco in quo &c. pro reparatione prædictorum sepium & defensionum inter prædict. boscum in quo, &c. and the said eleven Acres, &c. quandocunque eadem sepes & defensiones in decasu extiterint, and shewed further, That at the time of the

the Trespasse, &c. the said Hedges and Fences were in decay, and so justified: Upon which the Plaintiff did demur in Law: It was argued by Godfrey, That the Prescription is not good, for it appeareth, That this customary Land is contigue adjacent, to the said Wood, i. where the Trespasse was done: And of common Right the making of the Hedge doth appertain to the Owner of the Wood: And the Prescription is no more, but to take wood in the Lands of another, adjoining to my Land to make the Hedges of the same Land in which the wood groweth, which cannot be a good Prescription, for it sounds in charge, and not to the profit of him who Prescribes: Which see 22 E. 3. Prescription, 40. Trespasse against an Abbot, because where the Plaintiff was Farmer of the King of his Hundred of D. and by reason thereof he might make Attachment and distraine for the debts of the King within the said Hundred, and where for a certain debt the King he distrained the Beasts of one A. and the Abbot made Rescous, to which the Abbot said, That he was Lord of the Mannor of D. within which Mannor there was this custome, &c. That if any Distresse be taken within the said Mannor, that the same should be put into the Pound of the said Abbot of the same Mannor, and not driven out of the Mannor, and there ought the Distresse to remain three dayes, so that if the party would agree within the three dayes, that then he should have his Beasts, and he said, That the Plaintiff would have driven the said Beasts out of the said Mannor, and that he would not suffer him, upon which there was a demurrer, because it is not any profit to the Abbot but a charge to keep the Beasts of another: Also he said, That the King shall not be bound by such a custome as another person shall, where upon Judgement was given for the Plaintiff: So here in the principall case, There shall be no damage to the Defendant if the wood be not fenced, for if his Cattel escape into the wood, he may justifie it, because it is in default of the Plaintiffs inclosure: And if the Beasts of the Plaintiff escape into the Lands of the Defendant, he may take them Damage Feasant, for the cause aforesaid, 21 H. 7. 20. A Custome is pleaded, That if any Tenants of the Mannor shall take the Cattle of any one Damage Feasant, and shall therefore distrain them, that then the Tenant so distraining them ought to bring them to the Lords Pound, which if he shall not doe, at the next Court, he shall be amerced in a certaine sum, to the Lord of the Mannor to be paid, and that was holden no good custome because it is against common right, and the common Law, for by the common Law, and common reason, every one finding Cattel in his own Lands Damage Feasants, may impound them in his own Land, and the Lord is not damaged thereby: So it is of a By-law, That every one who holdeth so many Acres of Lands in such a Towne, shall yearly pay a certaine sum of money to the Church of the same Towne, and shall forfeit for every default of payment thereof twenty pounds, such By-law, although it hath continued time out of mind, yet it is not of any validity, because for not payment of the said sum to the Church, the Lord of the Mannor is not damaged, and therefore he shall not have any gaine, contrary if the penalty had been limited to the Churchwardens, because they are bound to repaire the Church. Another Exception was taken to the forme of the Prescription (Quandocunque eadem sepes & defensiones in decasu extiterint) and that is too generall, for so they might be in decay by his own default, as if he himselfe wrongfully pull up the Hedges, in which case, there is no reason but that he should repaire them at his own costs, and charges, and therefore he ought to have pleaded, cum in decasu extiterint in the default of the Tenant of the wood. Another Exception was taken because that here, this custome is pleaded particularly, & appropriated to the eleven Acres only, and is not extended to the whole Mannor, and to that purpose, the case of 40 E. 3. 27. was cited where a custome is applied to one part of a Towne, as to say that such a house

within

within such a Towne is of the nature of Gavelkind, and the rest of the Towne is gniluable : See 21 Eliz. Dyer, 363. It was adjoyned, &c.

Hill 20. Eliz. In the Common Pleas.

CCCCXXXIX. Hare and Okelies Case.

Michael Hare, and others, brought an Action of Trespasse against Okelie for breaking of their close, and carrying away of their cozne ; And upon the Issue, It was found by speciall Verdict, That the said Michael Hare was sole seised of the said Close where, &c. & so seised, exposuit ad culturam, anglice, did put forth to Tillage the said Land to the other Plaintiffs in form following, viz. That the said Michael should find one halfe of the cozne sowed, and the other Plaintiffs the other halfe, and that the said Land should be ploughed & tilled, and the Cozne thereof coming should be reaped and cut, at the charges of the other Plaintiffs and so cut should be divided by the Shock, and the said Michael to have the one halfe, and the other Plaintiffs the other halfe, &c. And it was the opinion of the whole Court, That notwithstanding these words (exposuit ad culturam) that no estate in the sole passed to the other Plaintiffs, but the said Michael did remaine sole seised as before, but by Anderson, upon the severance of the Cozne, peradventure a property in the said Cozne might be in all the Plaintiffs : But because it appeared, That Michael was sole seised and the other Plaintiffs had not any thing in the Land : Therefore it was adjudged that they could not joyne in the Action of Trespasse for breaking of the Close, and therefore it was awarded by the Court, that the Plaintiffs nihil cap. per brevium.

Trespasse.

Exposition of words.

Trin. 30. Eliz. In the Common Pleas.

CCCCXL. Beares Case.

In a Formdon by Beare, the Defendant pleaded in Bar, a warranty with Assets ; And upon the Issue nothing by descent, it was found, That the Ancestors of the Defendant whose warranty was pleaded in Bar, was seised of Land in the nature of Gavelkind, and by his will devised the same to his two Sons (whereof the Defendant was the Eldest) and their heirs equally between them to be divided, and it was adjudged no Assets, wherefore the Defendant had Judgment to have seisin of the Land.

Formdon.

Bar.

Pasc. 30. Eliz. In the Kings Bench.

CCCCXLI. Austin and Smiths Case.

The Case was, That Austin being a Copp-holder by License of the Lord leased his Copp-hold to Smith for years rendering rent, and afterwards by Deed granted the rent to another, to have during the Terme, &c. to which Grant the Lessee did assent and payd the Rent to the Grantee : It was holden by Gawdy Justice, That the Grant was good, but now it is but a Rent-seek : And it was said by some, That the Lessee cannot surrender such a Rent, unlesse he surrender the Reversion also ; Quere, if the Grantee may have an Action of Debt for it : It was conceived he could not, for he is not party nor privy to the Contract, nor hath the Reversion.

Copy-holder of Grants.

Rents.

Pasch. 31 Eliz. In the Kings Bench.

CCCCXLII. Underhill and Savages Case.

Pluralities.

Prohibition.

Archdeaconry

Savage was presented to a Benefice, and afterwards was presented to another, and then purchased a Dispensation (which was too late) and then was qualified; and afterwards accepted the Archdeaconry of Gloucester, And Underhill who had the Archdeaconry libelled in the Spirituall Court against the said Savage, where it is holden that all Ecclesiasticall Promotions in such cases are void, & now Savage sued a Prohibition. It was argued by Arkinson, That the Prohibition did lie, for the Patron hath his Remedy by our Law, by a Writ of Right of Advowson, See 29 E. 3. 44. If Avoidance be by Cession or deprivation, and the next presentment come in question, it shall be determined by the Kings Court, and here when he accepteth of another Benefice, it is cession by the Common-Law, but there ought to be a sentence, but now there needs not any sentence, for by the Statute of 21 H. 8. 13. the Church is ipso facto void. But it was objected, an Archdeaconry, is not within the Statute, for it is not any Cure with Souls: also an Archdeaconry is a late Promotion, and therefore it cannot be void by the Statute, Lewknor contra. The Patronage here doth not come in debate, but if the Defendant in the Spirituall Court will plead, That the Plaintiff is not Patron, but such an one, then a Prohibition lieth: withall the Justice granted, and it was said by Wray, that a Doctor of the civil Law had been with him, and affirmed to him, that their Law is, That if one having a Benefice with cure of Souls accepts an Archdeaconry, the Archdeaconry is void, but he said, that he conceived, that upon the Statute of 21 H. 8. the Law is qualified by reason of a proviso there, scil. Provided that no Deanry, Archdeaconry, &c. be taken or comprehended under the name of a Benefice, having Cure of Souls, in any Article above specified.

CCCCXLIII. Pasch. 30 Eliz. In the Kings Bench.

Award.

One was bounden to stand to the award of two arbitratores, who award that the party shall pay unto a stranger or his assigns 200 l. before such a day, the stranger before the day dieth, and B takes Letters of Administration, and if the obligor shall pay the money to the Administrator, or that the obligor should be discharged was the Question, and it was the opinion of the whole Court, that the money should be paid to the Administrator, for he is assignee: and by Gawdy Justice, if the word assignee had been left out, yet the payment ought to be made to the administrator, quod Coke affirmavit.

CCCCXLIV. Pasch 30 Eliz. In the Kings Bench.

Steward.

One sued in the Kings Bench for Costs given upon a Suit depending in the Hundred Court, the sum of the Costs was under 40 s. and the Plaintiff declared, That at the Court holden before the Steward, secundum consuetudinem Manerii predicti. It was objected that the Steward is not Judge in such Court, but the Justices, to which it was answered by the Justices, that by a Custome in a Hundred Court a Steward may be Judge, and so it hath been holden, and here the Plaintiff hath declared upon the Custome, for the Declaration is secundum consuetudinem Manerii, also the Subject may sue here in the Kings Bench for a lesser sum than 40 s. as if 10 s. Costs be given in any Suit here, Suit for such Costs lieth here in this Court.

Mich.

Mich. 30. and 31. Eliz. In the Kings Bench.

CCCCXLV. Pigot and Harringtons Case.

Pigot brought a Writ of Error upon a fine levied by him within age, the Case was, that the Husband and Wife were Tenants for life, the Remainder to the Infant in Fee, and they three levied a fine, and the Infant onely brought the Writ of Error, It was objected by Tanfield, that they all three ought to joyn in this Writ, and the Husband and Wife ought to be summoned and seised, Atkinson contrary, for here the Husband and Wife have not any cause of action, but the Infant onely is grieved by the fine, 35 H. 6. 19, 20, 21, &c. In conspiracy against many, it was found for the Plaintiffe, and one of the Defendants brought Attaint, and assigned the false oath in omnibus quæ dixerunt, but afterwards abridged the assignment of the false oath, as to the damages, and so the attaint well lies. Two women are Joint-tenants, they take Husbands, the Husbands and their Wives make a feoffment in Fee, the Husbands dye, the Wives shall have several Cui in vita's, for the coverture of the one was not the coverture of the other, 7 H. 4. 112. In Appeal against four, they were outlawed, and two of them brought Error upon it, and good, 29 E. 3. 14. In Attize against three Coparceners, they plead by Bailiff, nul tenant de Frankenement, &c. and found that two of them were disseisors and Tenants, and that the third had nothing, and afterwards the three coparceners brought attaint, and after appearance, the third sister, who was acquit, was nonsuit, and afterwards by award the Writ did abate, Tanfield, Although that the cause be severall, yet the erroneous act was joynit, and the receiving of the fine, and that Record being entice, ought to be pursued accordingly, and then the Husband and Wife shall be summoned and seised, and it is not like to the case of 29 E. 3. cited before, for there the third coparcener had not any cause of attaint, for no verdict passed against her, Wray, As the Error is here assigned, the Writ is well brought, for the Error is not assigned in the Record, but without it in the person of the Infant, and that is the cause of the Action by him and for no other. Two Infants levy a fine, although they joyn in Error, yet they ought to assign Errors severally, and they may sue severall Writs of Error, and afterwards it was holden by the Court that the Writ was good, and the fine reversed as to the Infant onely.

Error.

Attaint.

*Fine upon an
Infant reversed.*

Mich. 30. and 31. Eliz. In the Kings Bench.

CCCCXLVI. Scovell and Cavells Case.

In Ejectione firmæ by Scovell against Cavel, the Declaration was general upon a Lease made by William Pain, and it was found by speciall verdict, That William Leverledge was seised of the Land, &c. and leased the same to Stephen Cavel, John Cavel, and William Pain, habend. to them for their lives and for the life of the survivor of them; Provided always, and it was covenanted, granted and agreed betwixt the parties, that the said John Cavel, and William Pain, should not take any benefit, profit or commodity of the Land, during the life of Stephen Cavel, and further that the said William Pain should not take any benefit, &c. during the life of John Cavel, &c. Stephen Cavel, died, John Cavel entered, and afterwards William Pain entered, and made the Lease to the Plaintiff, upon whom the Defendant entered; and if the Entry of William Pain were lawfull was the Question,

Leases.

Gawdy Serjeant, his Entry is not lawfull. It will be agreed, That if a man lease to three for their lives, they are Joint-tenants, but if by the habendum the estate be limited to them by way of Remainder, the joint estate in the Premises is gone, and the Land demised shall go in Remainder, and I agree, that in deeds Poll, the words shall be taken strong against the grantor, contrary in the Case of Indentures, the words there shall be taken according to the intent of the parties, for there the words are the words of both: See Browning and Beestons Case 2. and 3. M. Ploid. 132. where by Indenture the Lessee covenanted to render and pay for the Land Leased such a Rent, the same is a good reservation, although it be not by apt words, and here in our Case, this Proviso and Covenant, Grant and Agreement both amount to such a limitation by way of Remainder, especially when such a clause followeth immediately after the Habendum, Coke contrary: The Office of the Habendum is to limit and explain the estate contained in the premises, and here the Habendum hath done its office, and made it a joint estate, and therefore the Clause afterward comes too late, and in truth is repugnant & utterly void, as to such pur pose, but perhaps an action of Covenant lies upon it, Wray. It hath been by me adjudged if a Lease be made to three Habendum successive, the same is a void word, and the Lessees are joint-tenants, contrary of Copphold by reason of Custom, and here the proviso and the clause following, is contrary to the Habendum, and repugnant, and is void, as to the dividing of the estate by way of Remainder, which Gawdy Justice granted, Heale Serjeant, this case hath been adjudged, 16. Eliz. A Lease to three Habendum to the use of the first for life, and after to the use of the second for life, and after to the use of the third for life, the same is good, Clench Justice, this proviso follows the Habendum, and is a sentence to explain the sentence, Wray, & sicur, it is another sentence, although it immediately follows the Habendum, Clench, if the words had been provided, that although it be limited, (ut supra) in the Habendum, scil. the first names shall have the Lands to himself for life, &c. it had been good by way of Remainder, Wray, our case at Bar, is not that any person shall take the Remainder, but that any of them shall not take the profits during the life of the other. Tanfield took exception to the verdict, because the life of Pain is not found in the verdict, Coke, this is a verdict and no pleading, and the opinion of the Court was, that the verdict was good, notwithstanding the said Exception, and afterwards Judgement was given for the plaintiff.

Mich 30 and 31 Eli. 2 In the Kings Bench.

CCCCXLVII. Hudson and Leighs Case.

Appeal of Mahem.

Damages.

Robert Hudson brought an appeal of Mayhem against Robert Leigh for maiming his right hand, and for cutting of his veins and sinews, which by that means are become dry, so as thereby he hath lost the use of his fingers, To which the Defendant pleaded, that heretofore the plaintiff had brought against him an Action of Assault and Batterie, and wounding, and therein had Judgement to recover, and Execution was sued forth by *scire facias*, and satisfaction acknowledged upon Record, of 100 Marks assessed by the Jury for the damages, and 11 l. 10 s. de incremento by the Court, with averment of all identities, Cooper Serjeant, the same is a good Bar, and although that an Appeal, and an Action of Trespasse are diverse Actions in nature, and in many circumstances, yet as to the recovery of Damages, the one shall bind the other, See 38 E. 3. 17. a good case. In Trespasse for breaking of his Close and Batterie, the Defendant pleaded, that before that the plaintiff by Bill in the Parshalley had recovered his Damages for the

same Trespasse, &c. and vouched the Record, and the Record was sent, the which was varying from the Record pleaded, for the Record vouched, was onely of Batterie without any thing of breaking of the Close: and also the Batterie is tared at another day, &c. and with averment, yet as to the Batterie it was holden good enough with averment, and as to the breaking of the Close the Plaintiffe had Judgement, See 41 E. 3. brev. 548. 12 R. 2. Coronar 110. and the Case betwixt Rider Plaintiffe and Cobham Defendant, Pasch. 19 Eliz. Rot. 74. it was clearly holden and adjudged, that after a Recovery in Trespasse, an appeal of Mayheim doth not lie, and the book which deceives the Plaintiff is 23 E. 3. 82. where it is said by Thorp, That notwithstanding Recovery in Appeal of Maheim, yet he may after recover in Trespasse: but Non dicat e contra, Popham contrary, the Plea in Bar is not good, for the Averment is, that the stroke and the wounding supposed in the writ of Trespasse, and in his Appeal of Maheim are all one, but it is not averred that any damages were given for the Maheim. as that the Maheim was given in Evidence, for it might be, that there was not any Maheim when the Trespasse was brought, but that after by the drying of the wound it became a Maheim, and then the action did rise, as, if a man upon a Contract promiseth to pay me 10. l. at Michaelmas, and other 10. l. at Christmas, if he doth not pay the 10. l. at Michaelmas, I may have an Action upon the promise for the not payment of that 10. l. and afterwards I may have another Action and recover damages for the not payment of the 10. l. at Christmas, but if I do not begin any action before Christmas, I cannot recover damages but once for the whole promise and damages shall be given in Evidence, and if I be disseised, I may recover damages for the first Entry, and notwithstanding that I shall have an Assise, and if I do reenter, I shall have Trespasse and recover damages for the mean profits, and the damages recovered for the first Entry shall be recompensed, and the book cited before Fitz. Coronar 110. doth not make for the Defendant, but rather for the Plaintiff, for there it is averred, that the Maheim was given in Evidence, in the Action of Trespasse, which it is not in our Case, Egerton Solicitor, we have shewed, That succissio venarum, in this appeal specified is eadem succissio & vulneratio mentioned in the Trespasse, Coke, Although the identity of the wounding and cutting of the veins are averred, yet it is not averred, that the damages recovered in the Trespasse were given for this Maheim, Wray chief Justice, The Jurors are to take consideration of the wound in an action of Trespasse, and to give damages according to the hurt, and we ought to think that they have done accordingly, and if they have not so done, the party may pray that the Court by inspection would adjudge upon it, and so increase the damages: But now when the Jury hath given great damages, scil. 200. Sparks, with which the party hath been contented it should be paid to give the plaintiff another Action, and if there be any such speciall matter, that it was not become a Maheim at the time of the Action of Trespasse brought, but it is become a Maheim of later time by drying, the plaintiffe ought to have shewed the same to the Court, and so have helped himself, for otherwise it shall not be so intended, but that the averment made by the Defendant, is good enough to oust the Plaintiff of this Action, and the Judgement cited 19 Eliz. before was given by me, after I was constituted chief Justice, and this Bar as I conceive was drawn out of the pleading in 19 Eliz. and afterward Judgement was given against the plaintiff.

Mich. 30 & 31 Eliz. In the Kings Bench.

CCCCLVIII. Crofman and Reades Cafe.

The Cafe was, that I S made his wife his Executrix and dyed, I D being then indebted to the Testator in sixty pounds upon a simple Contract, the Wife Executrix took to Husband the said I D, I D made his Executor and dyed, a Creditor of I S brought an Action of Debt against the Wife Executrix of I S, and upon the pleading, the matter in question was, If by the entermarriage of the wife with the Debtor of the Testator, the same was a Devastavit or not: And if the said Debt of sixty pounds due by I D should be Assets in her hands: And per Curiam, It is no Devastavit, nor Assets, as is supposed: For the woman may have an Action against the Executor of I D: And it was agreed by the Court, that if a man makes his Debtor and a stranger his Executors, and the Debtor dyeth, the surviving Executor may have an Action of debt against the Executor of the Debtor, and so it was adjudged in the principall case.

Mich. 31 & 32 Eliz. In the Kings Bench.

CCCCXLIX. Woollman and Fies Cafe.

If an Action upon the Case upon Assumpsit that the Plaintiff should enjoy such Lands for so many yeares: The Defendant pleaded the Statute of 13 & 14 Eliz. because the Land is the Glebe Land of such a Parsonage, and in truth the Defendant did misrecite the Statute: For the Statute is, No Lease after the fifteenth day of May: And (the pleading is hereafter to be made) Secondly, the Statute is of any Benefice with cure (the pleading is of any Benefice:) Thirdly, The Statute is, without absence above eighty, and the pleading is (without absence by the space of eighty) dayes: And for these Causes the Plaintiff had Judgment.

Trin. 31 Eliz. In the Kings Bench.

CCCCCL. Frond and Batts Cafe.

If debt upon a Bond upon condition to stand to the Award of I S: The Defendant pleaded, That the said I S had Arbitrated, that the Defendant should pay to the Plaintiff ten pounds, and he said he had paid it to the Plaintiffs wife who received it, upon which the Plaintiff did demur: And Judgment was given for the Plaintiff.

CCCCCL. Trin. 31. Eliz. in the Kings Bench.

Grants of the
King of the
Office of Mar-
shall of the
Kings Bench.

The Queen granted to George Carle of Shrewsbury, An. 15. of her reign, the office of Carle Marshall of England, and now came the said Carle and prayed, that I S one of his Servants, to whom he had granted the office of Marshall, of the Kings Bench might be to it, because the same is an office incident to his office, and in his power to grant, and that Knowles, to whom the Queen had granted the said office of Marshall of the Kings Bench by the Attainder of North, be removed: And a President was shewed, 14 & 15 Eliz. Betwixt Gawdy and Verney, where it was agreed, That the said

Intermarriage

Debt by Executors.

Assumpsit

Debr.

Payment to
the wife not
good.

said office was a severall office from the said great office, and not incident to it; And as to the Case of 39 H. 6. 33, 34. the truth is, the said office of Marshall of the Kings Bench was granted expressly by the Duke by express words, and so he had it not as incident to his office of Marshall of England: On the other side, there were three Presidents shewed, first in the time of E. 2, That the office of the Marshall of the Kings Bench was appendant to the said office of Marshall of England: Secondly, 8 R. 2. When the said great office was in the King, he granted the said office of Marshall of the Kings Bench: But 20 R. 2. both offices were rejoynd as they were befoze in ancient time, and there were also shewed Letters Patents of 4 E. 4. and 19 H. 8. by which it appeared, That the said inferiour office had time out of mind been part of the great office: And it was moved, That when the said great office is in the Kings hands, and the King grants the said under office, if now this office be not severed from the great office for ever: Wray, It is no severance, for the cheif office is an office of Dignity, which may remaine in the King, but this under office is an office of necessity, and the King himselfe cannot execute it, by which of necessity he ought to grant it. Another matter was moved, If the Grant of the King unto the Earle of Shrewsbury were good, because in it the Grant to Verrey of the said under office, is not rectified according to the Statute of 6 H. 8. 9. As 26 E. 3. 60. The King seised of the Honor of Pickring, to which a Forreist was appendant; the Bayliff of which Forreist he granted in fee rendering rent, and afterwards he granted the Honor with Appurtenances, and afterwards the Bayliff committed a Forfeiture, and that was found in Eyre, the Grantee of the Honor shall seize it, yet the King shall have the Rent: And here the Earle of Shrewsbury shall have this office in his power to grant; And so much the rather because it was granted but for life.

Trin. 31 Eliz. In the Kings Bench.

CCCCII. Michil and Hores Case.

Michil did affirme a Plaint in the Court of the City of Exeter against Hore for twenty pounds, and upon Nihil returned, it was surmised, That Trosse had certaine monies in his hands due to Hore, and according to the custome of Exeter the said monies were attached in the hands of Trosse, who appeared upon the Attachment, and pleaded, That he owed nothing to Hore, upon which there was a Demurrer, and Judgment given against Trosse because that Trosse ought to have pleaded, not only that he owed him nothing, but further that he had not any goods of Hore in his hands: And thereupon Trosse brought a Writ of Error, and assigned the Error in the principall matter, upon which it was demurred, and Judgment given against the Plaintiff, because that the Plea of Trosse (that he owed him nothing) is good enough, for if there be not a Debt, it is not attachable upon such Attachment: And it is a good Plea to a common intent, and altogether in use in London, where such custome is: Another Error was assigned, for that Michil had recovered costs against Trosse, where it ought not to be: And also Judgment is not given, that Trosse should be discharged against Hore; And afterwards, the Judgment given in Exeter was reversed.

Attachment of goods by custome of Exeter.

Error.

Mich.

Pleas.

Mich. 30 & 31 Eliz. In the common

CCCCLIII. Dennis and Saint Johns Case.

Debt.

Non est factum.

In Debt upon an Obligation, against Oliver, Saint John, and Alice his wife, as heire of her father: The Defendants pleaded, Non est factum, of the Father: And it was found by speciall Verdict, That the Obligation was made by the Father of the Wife to the Plaintiff, whereas in truth, The Plaintiff hath declared upon an Obligation made to himselfe only without speaking of any other joynr Obligee, and that the Plaintiff as Survivor hath brought the Action, and if upon the matter it shall be said the Deed of the Defendant in manner as the Plaintiff hath declared, the Jury refer unto the Court: And the case, 14 E. 4. 1. b. If thre enfeoff me, and I plead, That two did enfeoff me and the same be traversed, it shall be found against me, for the feoffment is a joynr act by them all: But if a man enfeoffeth me and two others, and they dye, so as I have all by Survivor, in pleading I may shew the feoffment was made to me alone: So 46 E. 3. 17. a. Thre Joynr-tenants in fee make a Lease for life, and afterwards two of the Joynr-tenants release to the third, who brings an Action of Waste against the Lessee, and the Verdict was, That he held of his lease only, and the Verdict was awarded good. Walmesley, This Plea, Non est factum, upon this matter is no good Plea, for he hath not pleaded it Respective as to the Obligation, but generally, Non est factum suum, which refers to the Obligor only, and the Issue is not whether he made the Deed to the Plaintiff or not, but generally whether he made it at all: For there is a difference, Nihil debet, for that refers to the Plaintiff, and where he pleads Non est factum: Which Shuttleworth granted: See 1 Eliz. Dyer, 167. Tawes Case, this Plea Non est factum, hath not any respect to the Obligee, for if the Obligee be a Son, and be another person who beares the name of the Obligee, yet in those Cases, the Obligor cannot safely plead Non est factum, but where one is sued who beares the name of the Obligor, there Non est factum is a good Plea: And see 10 Eliz. Dyer, 279. W S was bound in an Obligation to one H by the name of IS, and upon that Obligation an action was brought against him by the name of W S, and he pleaded Non est factum, and the speciall matter was found, and it was ruled, that upon that Verdict the Plaintiff should not recover, but the best way for the Plaintiff was, to sue the Defendant by the name by which he is bound, and then if he appeare and plead (ut supra) he shall be concluded by the Obligation: And the Court was clear of opinion, That the Plaintiff ought to have declared upon the speciall matter.

Hill, 31 Eliz. Rot. 1428. In the common Pleas.

CCCCLIV. Willis and Whitewoods Case.

Leases.

Surrenders.

The case was, That A was seised of certain Lands holden in Socage, and leased the same to I S for many years, and dyer, his heire within the age of fourteen years, the wife of A being Guardian in Socage leased the same Land by Indenture to the same I S for years. if the first Lease was surrendered, or determined was the Question: Anderson, Surrendered it cannot be, for the Guardian hath not any Reversion capable of a Surrender, but only an Authority given to her by the Law to take the profits to the use of the heire: But yet perhaps it is determined by consequence and operation of Law: As if A lease to B for one hundred years, and afterwards granteth the

the Reversion to C for two years, who leaseth to B for two years, who accepts the Lease, the same is not any Surrender, for a terme of one hundred years cannot be drowned in a Reversion for two years, yet the first Lease is determined, which Periam granted: And by Windham, If a Lease be made to begin at Michaelmas, and before that time, the Lessor makes a new Lease to the same Lessee to begin presently, the same is not any Surrender, and yet thereby the first Lease is determined, and so in the principall case, which Anderson granted, but Periam doubted of it, and he said, Guardian in Socage hath such an estate in the Reversion that he may enter for a Condition broken: Anderson, The same is not in respect of any estate that he hath, but in the name and right of the heir, and not by reason of any Reversion.

Trin. 31. Eliz. In the common Pleas.

CCCCLV. Norwood and Dennis Case.

In a Quare Impedit by Norwood against Dennis, the Issue was, If the Abbess was appendant to the Mannor of D, or in Grosse, and the Jury found that it was appendant, and further found, that the Queen had right, and title to present, for shee had presented at the two last Roydances, Anderson and Periam Justices, If it appeareth unto the Court upon the pleading, that the King hath title to present, The Court shall award a Writ to the Bishop for the King, but here appeareth no title for the Queen upon the pleading, but only upon the Verdict, so as the one part or the other may answer to it: And because the Jury have found for the Plaintiff, the title found for the Queen shall not be respected, but as a meer Sugation and Surplussage, for the same was out of their Issue, and their Charge, and it is no more then if one comes into the Court, and informes us of any title for the Queen, there the Court ought not to regard it.

Trin. 31. Eliz. In the common Pleas.

CCCCLVI. Green and the Hundred of Buckle-churches Case.

In an action upon the Statute of Hui and Cry, the Case was, That Green did deliver a certain summe of money to a Carrier, who put the same amongst other things in his Cart, and sent a boy of the age of twelve years with the Cart before, and he himselfe stayed a short time in the Inne, and afterwards went his way, and before he could get to the Cart the Cart was robbed and the money caried away: The boy made Hui and Cry, and came unto a Justice of Peace, and prayed that he would examine him, but he would not, but the Carrier himselfe would not goe to be examined, wherefore Green himselfe went to a Justice of Peace to be examined, and so was, and afterwards brought this Action: And it was holden by the Court, that here the Plaintiff had failed of his Action for want of sufficient examination, for the Person who was robbed ought to be examined, and the examination of the Person or Owner of the goods who was not present at the Robbery is not to any purpose to enable the Plaintiff to this Action, for the party robbed ought to be examined: And it was said by some, That where an action doth not lye upon the new Statute of 27 Eliz. the party may have an action upon the old Statute, but others were against it, for the Statute of 27 Eliz. is in the Negative, so as if the Action doth not lye upon it, no Action lyeeth at all: And it was moved by Periam and Anderson, That the Plaintiff might have an Action upon his Case framed upon the said Statute of 27 Eliz. against the Justice of Peace who refused to examine the boy; But Windham doubted of it,

it, because the Justice of Peace is a Judge of Record, and for such thing as he doth as Judge, no Action lyeth: To which it was answered by Periam and Anderson, That the Examination in such case is not made by him as Judge or Justice of Peace, but as a Minister appointed for the examination by the Statute, &c.

Trin. 31 Eliz. In the common Pleas.

CCCCLVII. *Stevinsons Case.*

Debt.

In Debt upon a Bond, the Condition was, That whereas the Plaintiff had covenanted with the Defendant, that it should be lawfull for the Defendant to cut down wood for Fire-wood and Hedge-wood without making any wast, or cutting more then necessary: And the Plaintiff assigned the breach in that Covenant (which is in truth the Covenant of the Plaintiff) that the Defendant had committed wast in felling wood, &c. And the Condition was to performe all Covenants and Agreements: And Exception was taken because that the Condition ought to extend but unto Covenants to be performed on the part of the Lessee, but the Exception was not allowed, for it is the Agreement of the Lessee although it be the Covenant of the Lessor the Plaintiff.

Trin. 31 Eliz. In the Kings Bench.

CCCCLVIII. *Foster and Wilton against Mapes.*

Covenant.

Foster and Wilton brought an action of Covenant against Mapes, and declared, That by certaine Indentures of Articles, it was agreed betwixt the Plaintiff and the Defendant, whereof one part was sealed with the seale of the Defendant, and the other with the seales of the Plaintiffs, that whereas the Defendant had leased to the Plaintiffs the Parsonage of B, he covenanted, That he would keep the Plaintiffs harmlesse concerning the same against one NB: And declared further, That the said NB had entred upon them; And that at the time of the making of the Indentures, he was Parson of B, i. The Defendant had pleaded Non est factum, and it was found by speciall Verdict, That the Defendant sealed one part of the Indentures, and that one of the Plaintiffs only sealed the other part: Exception was taken to the Declaration because there is not set forth in it any sufficient breach, for when the Defendant Covenants to save the Plaintiffs harmlesse against B, the same is to be intended of a lawfull Eviction: As in Pattenhams Case, 13 Eliz. Dyer, 306. But if the Covenant had been, That the Lessee should peaceably enjoy the Terme, sine ejectione & interruptione alicujus personæ, upon an unlawfull entry of a wrong doer, an action lyeth: See 16 Eliz. Dyer, 328. And here the finding of NB to be Parson at the time is to no purpose: And there is not layed any expresse title in NB, but only by implication, for it might be that the Parson had leased to the Defendant rendering Rent with clause of re-entry, and the Parson had entred for the Condition broken, and that the Plaintiffs ought to have shewed, and not generally, that he had entred, and that he was Parson: Also it is layed, That NB was Parson at the time of the Entry, but it is not shewed, what Entry, which may be taken, that he was Parson at the time the Plaintiffs entred by virtue of their Lease, and not when the said NB entred upon the Plaintiffs: Also the Plaintiffs have not declared, That they had entred by force of the Lease aforesaid,

aforsaid, and if not, then they cannot be ejected, &c. and then no breach of Covenant, Pudsey contrary, We have declared, that the Personage was demised to us, and that NB being Parson hath entred, and the Record was read. i. That where the Defendant had demised to the Plaintiffs the Personage of B. It was agreed, That the Defendant alwayes should keep harmlesse the Plaintiffs and the Premises against NB for and concerning omnibus pertinentiis, &c. Tanfield, The breach is well laid, and the words of the Covenants amount to as much, as if he had said, that he would keep them from all interruption, and the difference is, when the Covenant is generall, i. keep harmlesse, &c. the same doth not extend but to a lawfull interruption, but when it is speciall against such an one, there it extends to any interruption whatsoever, Gawdy Justice conceived, That the breach of Covenant is well laid, i. that NB hath entred upon them, and removed them, and be it by wrong or by Right, the same is a breach, for he hath not kept harmlesse the plaintiffs for the premises and profits of them, against NB 2 E. 4. 15. a Bond was endorsed upon condition, That the Obligor should defend to the Obligee for such a time, such Land whereof he had before encumbered him, It was holden, That if a stranger ousteth the Obligee, without any Title, the Bond is forfeited by reason of the words (defend) and although the Plaintiffs have not laid in their Declaration, that they have entred, the same is not materiall; for it is not the point of the action, but the Entry of NB is the cause of the Action, Fennor Justice conceived, That the difference put at the Bar betwixt Generall Covenant and speciall, is good Law, and that in case of such a speciall Covenant interruption without Title gives an Action: but he conceived, that because it is not alledged that the plaintiffs had entred, that there was no breach of Covenant, See 9 Eliz. Dyer 157. Wray, The words of the Covenant do amount to peaceable enjoying during the Term, and so to an interruption without Title, Fennor 18 E. 4. 27. A is bound to B to save B harmlesse from an Obligation made by the Plaintiff to one R, if R affirm a plaint of Debt against the said Plaintiff upon the said Bond, the Bond of A is forfeit, but here the Plaintiffs cannot be harmed, for they have not entred, Gawdy, The conclusion of the Declaration is, That NB entred upon the profits and removed them, so as they could not take the profits thereof, so it is implied, that the Plaintiffs had entred, and afterwards Judgement was given for the Plaintiff

Trin. 31 Eliz. In the Kings Bench.

CCCCCLIX. Marthes Case.

Man Executor of one Nicholson, brought a Writ of Error to reverse Error by Executors to reverse an attainder of the Testator.
An Outlawrie in felony had against his Testator, the Error assigned was plain, but it was moved, that this Writ of Error would not lie; Gawdy, The action will well lie, for by this suit the plaintiff intends to reverse, and so undoe the Outlawry, for which cause this matter ought not to be objected against him, for the Executor may have this action as well as the Heir, Fennor Justice, Where the principall reverseth the Attainder, the same shall extend to the accessorie. In assise against Tenant and disseisor, each of them may have a Writ of Error, and the reversal by the one shall make void the Record as to both, and he needs not any Garnishment, for by intendment the King is to have all his goods, and the King is alwayes presumed present in this court, quod tota curia concessit, and therefore there needs not any Garnishment by Seire facias, but Wray said, we use in such cases to call the Attorney Generall of the King to know if he can say any thing wherefore the Outlawry should not be reversed. The Error assigned was

was, That the *Erigent* issued forth into London, and the *Sheriffe* returned that he had proclaimed the party *de com. in com. quousque*, &c. where he ought to say *de Hustingo in Hustingum* and that was holden by the court clearly to be *Error*, and afterwards at another day it was moved by *Coke*, That a man attainted of *Felony* could not make *Executors*, for he is dead in Law, and as *Bracton* saith, *solus Deus facit Heredes & homo nominat Executores*, and therefore the *Heir* onely shall have a *Writ of Error*: also an *Executor* cannot have a *Writ of Error*, but onely upon a *Judgement* given in a *personall action*, but this *Attainder* is a thing of a higher nature: as where a woman *poisoneth* her *Husband*, the *Heir* shall not have an *Appeal*, for *Murder* is changed into *Treason*, and that offence is a thing of a higher nature; so this *attainder* is of a higher nature then in the *personality*. Also it may be *mischievous* to the *Heir*, for the *Executor* may forthwith *buy* and *pursue* his *Writ of Error*, by which the *Judgement* shall be affirmed, and so the *Right* of the *Heir* shall be bound, also when *Error* is brought to *reversis* and *outlawry* of *Felony*, a *scire facias* ought to be sued against the *Lords* *mediate* and *immediate*, which cannot be here at the *suit* of the *Executors*: also it was found by *Enquest* of the *Coroner*, that the *Testator* *fugam fecit*, so that thereby if he had been acquitted, he shall lose his goods, and then the *Executors* have not any reason to *bring* this *Writ of Error*, but see 11 H. 4. *Error* 31. That *Executors* shall have a *Writ of Error* of an *Outlawrie* pronounced against their *Testator*, and if it be reversed they shall have *restitution* of the goods of the *Testator*, but it doth not appear there that it was upon an *Indictment* of *Felonie*, *Alcham*, As well the *Executor* as the *Heir* is a person able for to sue a *Writ of Error* in such case, as 13 E. 4. where a *false oath* is given against one in *assise* and *dieth*, the *Heir* shall have an *attaint* for the *Land*, and the *Executor* in respect of the *damages*, *Popham* *Attorney General*, This *Outlawrie* is a *reall Judgement*, therefore the *Executor* cannot have *error* upon it, *Wray*, It is good That this case be considered, for it may be *mischievous*, for thereby the *Executor* shall avoid the *attainder* against the *King*, and the *Lords*, *Fenner*, That cannot be without a *scire facias*, *Gawdy*, The *Executors* shall have this *action*, and as to that which hath been objected, that the party attainted cannot make *Executors*, the same is no reason for the *Executors* do pretend, that their *Testator* was not lawfully outlawed, and so by this *Suit*, they do endeavour to take away that disability, and therefore it ought not to be objected against the *Executor*, and if the Case here be, That the *Testator* had not lands, but only goods, there is no reason, but that the *Executors* should have a *Writ of Error*, otherwise the goods of the *Testator* should be lost, and it was clearly holden by *Wray* chief Justice, That the *Executor* might have and pursue this *Writ of Error*, the *Outlawrie* of the *Testator* notwithstanding; and afterwards the *Outlawry* was reversed accordingly.

Trin. 31 Eliz. In the Kings Bench.

CCCCCLX. *Trussells Case.*

Habeas corpus **T** Russell was removed out of the Counter of London by *Habeas corpus* into the Kings Bench: *Egerton*, The *Queens Solicitor* moved the Court, that *Trussell* was a person attainted of *felony*, & so had not any lands or goods, to satisfy, &c. and also his life was not his own, and upon the Return of the *Habeas corpus*, it appeared that *Trussell* was detained in prison for an execution, and for divers actions, and it was the opinion of the Court, That as to the Execution he ought not to be discharged, for then the party should lose his Debt for ever: but as to the other actions, it was the opinion of all the Justices,

Executions.

Wices, that Trussel ought to be discharged of them, for a man so attainted ought not to be put to answer, nor taken in Execution, and so are all our books, and they said that they had conferred with the Justices of the Common Pleas, and with the Barons of the Exchequer, which were of a contrary opinion in this case upon the very matter, and not upon the manner of the pleading, but yet we will discharge our consciences as we have done, for there is not any book against us, Egerton stetit super semitas antiquas, and at last it was awarded, That Trussel should be discharged of all actions brought against him.

Trin. 31 Eliz. In the Kings Bench.

CCCCXI. Sovers Case.

Over and others were indicted upon the Statute of 8 H. 6. of forcible Entry, because they had expelled one A out of his Land, and disseised the Mayor and Commonalty of London, who were in Reversion, and the same being removed hither, restitution was prayed thereupon, and White for the City, who was in Reversion, and the Lessee prayed that no Restitution might be, for they had let the house to another, and that he who had procured this Indictment claimed in by a Custom of London, That the Executors of the last Termor should not be put out, if he shall give as much for it as any other will. whereas in truth there is not any such Custom, and for that cause the Restitution was stayed, and it was said by the Court, that Restitution shall be alwayes made to him in the Reversion, and not to the Lessee for years, for he who is disseised shall be restoyed, and then the Lessee may re-enter, Indictments upon Statute 8. H. 6.
Restitution.

Trin. 31 Eliz. In the Kings Bench.

CCCCXII. Beal and Carters Case.

In an action of false imprisonment, the Defendant justified because the Plaintiffe brought a child of the age of six years, and not above, into the Parish Church of W. & eundem ibidem relinquere voluisset, & intendisset, without keeping, or nourishment, to the danger and destruction of the child, & contra pacem, for which the Defendant being Constable of the said Parish arrested the Plaintiffe and put him in prison untill he did agree and promise to carry the child from whence it came, upon which the Plaintiffe did demurre in Law: It was moved, that the Justification was good, for every subject might do it, as fortiori a Constable, and if in this case the child, being so exposed, should be furnished for want of nourishment, it had been murder as it was holden at Winchester before the Lord chief Baron, 20 Eliz. Another Exception was taken to the Plea, because he saith (quendam infantem) without naming him, and he ought to say, Quendam infantem ignotum, but that Exception was not allowed; another Exception (ibidem relinquere intendisset) but he doth not say, that he did depart from it, and then his meaning is not traversable, or issuable, or to be tried by Juries, See 22 E. 4. 47. Gawdy Justice; It was a great offence in the Plaintiff, but the same ought to be punished according to Law, but the Constable cannot imprison a subject at his pleasure, but according to Law, i. to stay him and bring him before a Justice of the Peace to be there examined, Wray. If the Defendant had pleaded that he stayed the Plaintiff upon that matter, to have brought him before a Justice of Peace, it had been a good Plea, Fennor, The justifications

justification had been good, if the Defendant had pleaded, that the Plaintiff refused to carry away the child, so all the Justices were of opinion against the Plea, but they would not give Judgement by reason of the ill example, but they left the parties to compound the matter.

Pasch. 33 Eliz. In the Kings Bench.

CCCCXLIII. Cole and Wallis Case.

Ejectione Custodie lieth not upon a Copyhold estate.

In an Ejectione Custodie, the Plaintiff declared, that A was seised of the Mannor of D within which Mannor are diverse Copyholds of inheritance, and that the Custome of the Mannor is, that if any Copyholder of inheritance of the said Mannor dieth, his heir within the age of 14 years, that then the Lord of the Mannor might grant the custodie of his body and Lands to whom he pleased; and shewed, that one Cleyerle a Copyholder of inheritance of the said Mannor died, his son and heir within the age of 14 years, upon which the Lord of the Mannor committed the custodie of his body and Lands to the Plaintiff, and the Defendant did eject him, and upon not guilty, it was found for the Plaintiff; It was moved in arrest of Judgement, That this Action would not lie upon a Copyhold estate; Quod tota Curia concessit, and yet it was said, that an Ejectione firmæ lieth upon a demise of Copyhold Land, by Lease of the Copyholder himself, but not upon a demise by the Lord of the Copyhold; Quod fuit concessum, and afterwards the Case was made on the Plaintiffs side, and it was said, that this was but an action upon the Case, in the nature of an Ejectione firmæ, and this interest is not granted by Copy, but entered onely into the Court Roll; so it is not an interest by Copy, but by the Common Law, for the words are, Quod Dominus commisit custodiam, &c. and doth not say in in Curia and afterwards Judgement was given for the Plaintiff.

Trin. 33 Eliz. In the Kings Bench.

CCCCXLIV. Bond and Bailes Case.

Judgement upon a Bond where satisfied before a Statute.

Bond brought a Scire facias against Bailes administrator, of one T Bop Bon a Recovery had against the Intestate, in action of Debt, the Defendant pleaded, That before the said Judgement given, the Testator did acknowledge a Statute Staple to one C. and that the Bond was not paid in the life of the Testator nor after, and that they have not in their hands any goods of the Intestate beyond what will satisfy the said Statute, upon which there was a demurrer in Law, and Crook argued, That the Bar is not good, for here is not pleaded any Exemption upon the Statute, and then the Judgement, the Statute being things of as high nature, that of which Exemption is sued, shall be first sued, and if this action had been brought upon a Bond, the Plea had not been good: for although that Brian saith, 21 E. 4. That Herogizances shall be paid by Executors before Bonds, yet that is to be intended, when a Scire facias is to be sued upon it, otherwise not: And 4 H. 6. 8. in a Scire facias upon a Judgement, fully administered, at the day of the writ brought is a good plea, by which it appeareth, That the Executors shall pay the Debt upon the Obligation before the writ brought, it had been good, See 12 E. 3. Executors 73. In a Scire facias upon a Judgement in Debt given against the Testator, Enquire shall be what goods the Executors had the day of the Scire facias: and he said, it was moved by Anderson, 20 Eliz. in this Court. In Debt upon a Bond against Executors

for, the Defendant pleaded, that the Testator was indebted by Judgement to A, and that they had not more, then to satisfy the same, and it was holden no plea, if not that he pleaded further, that a Scire facias was sued upon it: Wray said, The same is not Law, and there is a difference when the Judgement is given against the Testator himself; and where against the Executors, for where Judgements are given against Executors, the Judgement which is given before shall be first executed, but if two Judgements be given against the Testator, he who first sues Execution against the Executors shall be first satisfied, because they are things of equal nature, and before suit, it is in the Election of the Executor, which of them he will pay, See 9 E. 4. 12. As if two men have Tallies out of the Exchequer, he which first offers his Tally to the officer shall be first paid, but before that, it is in the choice of the officer, which of them shall be first satisfied, and therefore, 19 H. 6. If the Lease enrolled be lost, the Enrolment is not of any effect, and Pasch. 20 Eliz. our very case was moved in the common Pleas, in a Scire facias upon a Judgement given against the Testator, the Executor pleaded, That the Testator had acknowledged a Statute before not satisfied, Ultra quæ, &c. and it was holden no Plea, for a Statute is but a private and pocket Record, as they called it, and 32 Eliz. betwixt Conny and Barham, the same plea was pleaded, and holden no Plea. Also if this plea should be allowed, great mischiefs would follow: for then no Debts should be satisfied by Executors, for it might be, that the Statute was made for purpose of Covenants, which Covenants perhaps shall never be broken: and afterwards Judgement was given for the plaintiff.

Conny and Barham's Case,

Trin. 32 Eliz. In the Kings Bench:

CCCCLXV. Crew and Bailes Case.

A writ of Error was brought upon a Judgement given in the common Pleas, in a Bill of privilege brought by an Attorney of the said Court, upon an Obligation, and upon the said Judgement issued forth procelle of Execution, upon which the Defendant was outlawed, and the Error was assigned in this, That upon that Judgement procelle of outlawrie doth not lie, for Capias is not in the originall Action, and so was the opinion of the whole Court, being upon a Bill of privilege, and the Outlawrie was reversed, and the Error was assigned in the first Judgement, because there were not fifteen dayes betwixt the Teste of the Venire facias, and the return of it, but that was not allowed, for it is helped by the Statute of 18 Eliz. cap. 14.

Error.
Priviledge.

Trin. 30 Eliz. In the Kings Bench.

CCCCLXVI. Wade and Presthalls Case.

William Wade brought an Action of Debt against Presthall, the Defendant pleaded, That he was attainted of Treason not restored, nor pardoned, and demanded Judgment if he should be put to answer, upon which the Plaintiff did demur; It was argued for the Plaintiff, that the Plea is not good, for the Defendant shall not take benefit of his own wrong: A person attainted gives his goods, he shall not avoid it; A woman takes a Husband, thereby she hath abated her own writ: It is true, That a person attainted is a dead man, it is so, as to himselfe, but not as to others, 33 H. 6. a person attainted is murdered, his wife shall have an appeal, so as to all respects

Plea is disability of himself not allowed.

respects he is not dead, and although as yet the Plaintiff cannot have any Execution against the Defendant, yet here is a possibility to have Execution, if the Defendant get his pardon: As a man shall have warrantia Charta, although he be not impleaded and yet he cannot have execution, but there is a possibility to have execution, 22 E. 3. 19. A Kent granted to one in free upon condition, that if the Grantee dye, his heir within age, that the rent shall cease during the nonage, the Grantee dyeth his heir within age, his wife brought Dowry presently and recovered, and yet she cannot have execution, but yet there is a possibility to have execution, viz. upon the full age of the heir: Coke, contr. by his Attainder he hath lost his Goods, Lands, life, &c. free, for he is now become terra filius, and he cannot draw blood from his Father, nor afford blood to his Son or his posterity, so as he hath neither Ancestors, nor Heire, and as to the possibility, the same is very remote, for the Law doth not intend that he shall be pardoned, and see 6 H. 4. 64. A man committed a Felony, and afterwards committed another Felony, and after is attainted of one of them, he shall not be put to answer to the other, but if he obtaine his Charter of pardon, he shall answer to the other, See also, 10 H. 4. 227. 1. Coronor: Popham Attorney General: The Defendant ought to answer, for none shall have advantage of his own wrong: The Plaintiff is made a Knight pendant the writ, it shall abate, because his own Act, but here Treasons are so heinous, that none shall have ease, benefit or discharge thereby: And if the Defendant shall not be put to answer untill he hath his pardon, then the action is now suspended, and an action personall once suspended is gone for ever, and he cited 29 E. 3. 61. in the Book of Assizes, where it is said by Shard, execution upon a Statute may be sued against a man attainted, and he said, That if the Enemy of the King comes into England, and becomes bounden to a Subject in twenty pounds, he shall be put to answer, notwithstanding that Interest that the King hath in him: Harris Serjeant to the same intent, he conceived by 33 H. 6. 1. That Traitors are to answer, for if Traitors breake the Gaole, the Gaoler shall answer for their escape, for the Gaoler hath remedy against them, contrary of the Kings Enemies, and he cited the case of one Burchet, who being attainted of Treason struck another in the Tower, for which notwithstanding his Attainder, he was put to answer: Egerton Solicitor General: And he said, That the Action is not suspended, but in as much as every Action is used to recover a thing detained, or to satisfy a wrong, and if it can appeare that the party cannot be satisfied according to his case, he shall not proceed: And in this case, the Plaintiff, if he should obtaine Judgement could not have execution by the common Law, for he hath no goods, nor by the Statute of Westminster, 2. by Elegit for he hath no Lands, nor by the Statute of 25 E. 3. by his body, for it is at the Kings pleasure, and then to what purpose shall the Plaintiff sue, and it is a generall rule, That in all Actions, where the thing demanded cannot be had, or the person against whom the thing is demanded cannot yield the thing, that the writ shall abate: As in a writ of Annuity by Grantee of an Annuity for years, the terme expireth, the writ shall abate; Tenant in speciall tail byings Waste, and pendant the writ, his issue dyeth, the writ shall abate, &c. 2 E. 4. 1. A man Outlawed of Felony pleaded in disaffirmance of the Outlawry, and yet he was not put to answer untill he had his pardon, and then he shall answer: And as to the case of 33 H. 6. 1. It doth not appeare that the Traitors were attainted, and then there is good remedy enough: And Burchets case, cannot be resembled to our case, for although that by the Attainder the body of the party might be at the Kings pleasure, yet his body may be punished for another offence, for the example of others: And as to Tressels case, who in such case was put to answer, I grant it, for he con-

Execution against a person attainted.

Burchets case.

Regula.

Abatement of Writ.

cluded Judgment if Action, and so admitted him a person able to answer, and then it could not be a good Plea in Bar: And in Ognells case, the return of the Sherifff shall bind them, for upon Proceſs againſt a perſon attainted, they returned Cepi where they ought to have returned the ſpeciall matter without a Cepi, but now this generall returne ſhall bind them, and by that he ſhall be concluded to ſay that the party was not in Execution: And this Plea is not any diſabling of the Defendant, but he informs the Judges that he is not a perſon able to answer to the Plaintiff: As in a Precipe quod reddat, the party pleads Non-tenure, the ſame is no diſabling of his perſon, but a ſhewing to the Court that he cannot yeild to the party his demand: A man ſhall not take advantage of his own wrong, i. in the ſame thing in which the wrong is ſuppoſed, as againſt him againſt whom the wrong is ſuppoſed to be done, but in other caſes, he ſhall take advantage of his own wrong, as Littleton, Al a Leaſe for life be made, the Remainder over in Fee, and he in the Remainder entreteth upon Tenant for life, and diſſeiſeth him, the ſame is a good ſeiſin, upon which he may have a Writ of Right, Littleton, 112. 35 E. 3. Droit, 30. And yet this ſeiſin was by wrong: And there was a Caſe betwixt Marbery and Worral in the Exchequer, the Leſſor entred upon his Leſſee for life, made a Feoffment in Fee with claue of re-entry, the Leſſee re-entred, the Leſſor at the day came upon the Land and demanded the Rent which was not paid, it was holden the ſame is a good demand of the Rent, and yet he is a Treſpaſſor to the Leſſee: And in another Caſe, A man ſhall take advantage of his own wrong, Fitz. N. B. 35. N. An Infant hath an Abbatſon by diſcent, the Church becomes void, he who hath Right paramount inſurps, and preſents to the Church and the ſix moneths paſſe, now by this tortious uſurpation, he is remitted, and the Infant out of poſſeſſion and without remedy: And he cited the caſe, 16 H. 7. 10. A Scire facias out of a fine was brought againſt an Abbot, by which fine the Predeceſſor of the Abbot granted to find a Preſt to ſing Maſſe in ſuch a Chappell, &c. and the Abbot pleaded, That the ſaid Chappell was become ruinous and decayed, ſo as no Preſt could ſing Maſſe there, and it was prayed on the part of the Plaintiff, that for as much as the Covenant is confeſſed that Judgment be given, but that Execution ſhould ceaſe untill the Chappell be re-built, but it was not allowed, for this is a good Bar for the time, and no Judgment ſhall be given, for it ſhall be in vain, for it cannot be executed becauſe there is no Chappell, and it may be the Chappell ſhall never be built againe: And ſo in the principall caſe, &c. It was adjoyned.

Cases where a man ſhall take advantage of his own wrong.
Marbery and Worral's caſe,

Trin. 33 Eliz. In the Kings Bench.

CCCCXLVII. Knightley and Spencers Case.

[A Prohibition betwixt Knightley and Spencer, The Caſe was, That Ph. Abbot of Eweſham, and all his Predeceſſors time out of mind, &c. were ſeiſed as well of the Rectory impropriate of B in the County of N and alſo of the Mannor of B in the ſame Pariſh, &c. untill the diſſolution of his houſe, and that by reaſon thereof, the ſaid Abbot and all the Predeceſſors had holden the ſaid Mannor diſcharged of payment of Tythes, untill the diſſolution, &c. and ſaved the branch of the Statute of 31 H. 8. And that the ſaid Abbot did ſurrender the Poſſeſſions of the ſaid houſe to the King, and that the King held the ſame diſcharged of the payment of Tythes, and that afterwards the King granted unto the anceſſor of Knightley the ſaid Mannor, and to the anceſſor of Spencer the ſaid Rectory, and although the Plaintiff ought de jure to hold the ſaid Mannor diſcharged of Tythes; yet the Defendant ſued him in the Spirituall Court, &c. To which the Defendant confeſſing

Prohibition.

Unity of pos-
session a dis-
charge of
Tithes,

confessing the Impropriation, pleaded, That the said Abbot was seised, *in*
supra, but that before the making of the said Statute of 31 H.8. the said
Abbot demised Decimas Rectorie predict. to one Spencer for 70 years, who
made the Defendant his Executor, and died, and that at the time of the said
Demise, and dissolution of the said Abby, one Goodman and others were
possessed of the said Mannor, untill the year 1585. which was the year be-
fore the Suit began in the Spiritual Court, and that at the time of the dis-
solution he paid Tithes for it, and now the Plaintiff refuseth to pay, &c. *ab-*
que hoc, That the Abbot and his Predecessors held the said Mannor quit of
the payment of Tithes time out of mind, &c. upon which the plaintiff did
demur in Law, Cook, for the plaintiff, That this Unity of possession is a
discharge within the Statute of 31 H.8. the words of which are, That the
King and his assigns, shall have and enjoy the Lands discharged and ac-
quitted of Tithes, as freely as the said Abbot held the same at the day of the
dissolution: And see before, whereas divers Abbots, were acquitted and
discharged of, and for the payment of Tithes, for the Statute doth not in-
tend a real discharge, as by composition of such manner, which is not here,
but only a suspension, which is not any discharge in Law, yet in speaking of
discharge ordinarily an actual discharge is understood, As if I be bound by
Obligation to discharge one of such a Bond, it is not enough to pay the money,
but I ought to procure an actual Discharge, where it is put generally, but
where it is put secundum quid, as it is here referred to the Dissolution. A
suspension is a Discharge intended in the said Statute, but where the Sta-
tute is indefinite, there an actual discharge is understood, but restrained to a
time a suspension sufficeth, and truly it is a discharge within the intent of
the Statute, for if the Statute shall be intended of an absolute discharge,
and a Discharge in Law only, the Statute had been superfluous, for the
Law said so much before, for without such provision, the King and his al-
ligns held discharged from payment of Tithes, But the makers of the
Statute knew well enough, That the Abbot might have such discharge
by divers means, and it should be infinite for the party interested to
empire of them all, and therefore they enacted wisely, That if at the time
of the dissolution they were in any manner freed of payment of Tithes, the
same should be sufficient, and here is not any wrong unto any, for the Par-
son had all as he had before, and the same is like to the Case betwixt War-
ton and Morley, 7 Eliz. in the Exchequer, the Report of which Sir Rowden
communicated unto me, and it was upon the Statute of 1 E. 6. cap. 14. of
Monasteries, That all Grants made to the King by any Probst, Gover-
nor, &c. of any Mannor, &c. shall be good, &c. and the Case was, That
a Prebend of the Church of York surrendered to the King, but the surrender
was never enrolled, and yet adjudged good upon the Statute, for if it was a
lawfull surrender, the same had been good of it self, without any aid of the
Statute, which was made to supply insufficient assurances, and so in our
Case for the Case at large, and it should be injurious to give the Jurys to
quire of the manner of the Discharge, if it were by composition upon the
foundation, or by dispensation of the Pope, as Cisterces Templars: And
here the plaintiff hath declared of an Impropriation before time of memo-
ry, and so before the Councille of Laterane, which was within these 400
years, and 23 Eliz. there was a Sussex Case, where the plaintiff declared
here, but they would not proceed, and see Dyer 10 Eliz. 277. 278. The
Prior of S. John hath privilege from Rome, that he shall not pay Tithes
for any Land, quas propriis manibus aut sumptibus excolant, but their Pre-
decessors have paid Tithes, and it was holden, that in the hands of the Pre-
decessors Tithes should be paid, but after the Term ended, the Defendant
hold discharged, so as the Statute hath a favourable consideration upon the
point: Now it is to see, if the Lease of the Rectorie by which the Defen-
dant

Wharton and
Morley's Case.

nants claim be good or not, and then admitting, that *Tithes* are due in this Case, yet if his Lease be void, he shall not have a consultation, especially if it appeareth upon his own shewing, as it was holden in a Hampshire Case betwixt Sutton and Dowze, which see Mich. 25 and 26 Eliz. and in that case the Lease is void, for it was made within a year after the Statute of 31 H. 8. the January before, and the Statute in April after, for he hath not averred, that the usuall Rent is reserved, nor that the Land was usually let to farm, for which Leases otherwise made within the year are absolutely void by the said Statute: but it will be objected, That this matter shall come in of our part, and it is sufficient for them to plead the Case, but it is not so, as it was lately agreed in Heydons Case in the Exchequer, where the Case was, That the Warden and Canons of the Colledge of Overy leased certain Lands to Heydon for years, and he in pleading of his Lease did not shew, that the ancient Rent was reserved, and therefore naught, and so was the opinion of the Justices of the Common pleas, in the Case betwixt the Lord Cromwel, and All-Souls Colledge, upon the Statute of 13 Eliz. cap. 6. upon a branch of it, by which it was provided, that the third part of the Rent reserved upon any Lease, should be paid in coin, &c. and the Leases made to the contrary should be void, and in an Ejectione firmæ, brought upon such Lease, because it was not shewed in the Declaration, that the Coin was reserved according to the Statute, Judgement was arrested, and we need not to plead the Statute, for although the Statute be particular, yet because the King hath interest in it, it shall be holden in Law a generall Act, and the Judges shall take notice of it, although it be not alledged by the party, as it was ruled in the Lord Barkleys Case, 4 Eliz. Plow. 231. but if such Rent was reserved, yet the Lease cannot be good, for the King cannot have his Rent, because it is not incident to the Reversion, nor passeth by the Grant of the Reversion, for it is not a Rent, but rather a sum due by reason of contrag, which see 30 Ass. 6. A man leaseth a Hundred, reserving Rent, or grants a Rent out of a Hundred, the same is not a good Rent, but merely void, for a Hundred is not immovable, nor can be put in view, nor any Assise lieth of such Rent, see 9 Ass. 24. and in 20 Eliz. in the case betwixt Corbet and Cleer, the Dean and Chapter of Norwich leased a Parsonage, and common of pasture reserving Rent, 1 E. 6. they surrendered their possessions to the King, and afterwards the King granted the Parsonage, without speaking of the common of pasture, It was holden that the patentee of the parsonage should have all the Rent, and no appoyntment should be in respect of the Common, for all the Rent issueth out of the Parsonage, and nothing out of the Common: So here for *Tithes* are not an Hereditament, which cannot support a Rent within this Statute, for which cause the Lease is void: Also he said, that the traverse of the Defendant was not well taken, for the Plaintiff hath said, That time out of mind, &c. the Abbot and his Predecessors were seignors of the Rectorie to which also said, simul & semel, and racione inde was discharged, &c. at the time of the dissolution, the Defendant traverseth altho he hot, that the Abbot and his Predecessors held discharged of *Tithes* time out of mind, &c. which is not good, for he hath traversed our conclusion, for our plea is an argument, wherefore veris unity, time out of mind, &c. there is a discharge of *Tithes* but in the Abbot was such an unity, ergo he held discharged of *Tithes*, as 21 E. 3. 22. In a Praecipe quod reddat, the Tenant saith, that the Land in demand, is parcell of the Mannor of D, which is ancient Demelne, and, &c. to which the Plaintiff saith, That it is Frank fee, and the same was not good, for he denies the Conclusion, but he ought to plead to the nature of the Mannor, that it is not ancient Demelne, or that the Land in demand is not parcell of it. Another matter was, because it is pleaded, suit in tenure & occupatione of Goodman and others, but he doth not shew by what Title, disseisin or *Warr*, or other Title, &c.

Buckley contrary, And he said, This unity of possession is not any discharge of Wythes by the said Statute, and as to the case cited before, of 3 H. 7. 12. where Tenant in tail of a Kent entred upon the Tenant of the Land, now is the Kent suspended, and then after when he makes a Feoffment in fee, by that Feoffment the Kent is extinguished which was but suspended at the time of the Feoffment, and therefore some have holden that if after such Entry, he makes a Lease for life of the Land, that his Kent or Seigniorie is utterly gone in perpetuum, for by the Liberty all passeth out of him, which he said cannot be Law, and so it seemed to Gawdy Justice, Then upon such Feoffment with warranty he could not vouch as of Land discharged of the Kent generally, but as of Land discharged at the time of the Feoffment, with Process that the suspension is not a discharge, for it was suspended before the Feoffment, and discharged by the Feoffment, and so suspension is not a discharge, a Fortiori in the Case of Wythes, for in the case of common and rent, although they are suspended, so as they cannot be actually taken, yet they are to some intent in esse: As where Lands holden of other Lords are in the hands of the King for Primer seisin by reason of Prerogative, and during such seisin of the King the Lord gets seisin, the same is a good seisin notwithstanding that it was suspended, so as he could not distrain: And also in Allia of Land, damages as to the Kent out of the Land shall be recompensed, therefore the rent in some sort is in esse, and a multo fortiori, this Tithe, which is a thing of Common Right, shall be in Esse, but goes with the Land, and therefore by unity of possession shall not be suspended; 35 H. 6. he who hath liberty of Warren in the Lands of another entred into the Land, the Warren is not suspended, nor by Feoffment of the Land is exting, and in this Case upon the matter, during the unity of possession, the Wythes were paid, although not in specie: also the Abbot had the Wythes as Parson of B, and the Land as Abbot, and therefore no suspension, for the Wythes were always in esse, although not taken in the manner, as Wythes commonly are, but by way of Retainer, 22 E. 4. 44. A writ of Annuity is brought against a Prior, and it appeared, That the Prior and his Successors have used to pay the Annuity as Parson of D, and not as Priors, which Parsonage was appointed to the said Prior time out of mind, and in the writ, the Defendant was named Prior only, and not Parson, and therefore the writ was abated, See 14 E. 4. 10 H. 7. 5. In an Action of Waste: So Bracebridges Case, 14 Eliz. Plowd. 420. The Case put by Catline, If the Parson, Patron and Vicar make a Lease for years, and afterwards the Lessee becomes there Incumbent, the Term is not void, for he hath the Term in his own Right, and the inheritance in the Right of his Church, which see 30 H. 8. Dyer 41. A Parson purchaseth, and afterwards leaseth his Parsonage, he himself shall pay Wythes, notwithstanding this unity, and as to the reason of the other side, That if such Discharge of Wythes be not intended by the Statute, but onely a Discharge in Law, the Statute should be in vain, the same is not so, for if the Abbot had been discharged by way of release or composition for the Monasterie being dissolved, the Appropriation had been gone, if it had not been supported by the Statute, and then the Release and composition of no force, and the King should not take advantage of it, but by this Statute, and as to Whartons Case before cited, the same cannot be Law, for it hath been holden upon the Statute of 18 Eliz. of Confirmations, That if an Infant maketh a Lease to the King, the same is not made good by the Statute, for the said Statute extends to imperfections in circumstances, and not in substance. And although the Lease be not good, yet because the matter of the surmise is naught, although our Bar be naught, a Consultation ought to be granted, also our Lease is well pleased, and if such defect be in it, as hath been objected, the same ought to come in by Plea on the other side, and

A Rent in esse to some purposes, and suspended to other,

it is not like Heydons Case, for there it was found by special Verdict, nor to Cromwells Case where such defect was in the Declaration, and so no ground of Action, as to the Traverse it is good enough, as if special Bastardy be pleaded against one born before the marriage, and so Bastard, the other party shall traverse generally the Bastardy, and not the special matter, but for the principall matter, i. this unity of possession, divers rules have been. 5 Eliz. in the Common Pleas, The Case was, An Abbot had a Mannor within the Parish of D, and a Composition was made betwixt the Parson of D, and the said Abbot, that the Parson should have yearly certain Loads of Wood, out of thirty Acres of the said Mannor, for, and in recompence of all the Tithes of Wood there, afterwards the Parsonage was appropriated to the said Abbot, and afterwards the house was dissolved, and the Mannor granted to one, and the Rectory to another, and it was holden, That the portion of Tithes was removed, for he had them, scil. The Mannor and the Tithes in severall Rights, and Manwood Chief Baron, and Periam Justice, to whom a Case depending in the Chancery was referred concerning the discharge of Tithes by unity of possession, delivered their opinions, That such an Unity is not any discharge within the said Statute: It was adjourned.

Mich. 32 Eliz. In the Kings Bench.

CCCCLXVIII. Hoskins and Stupers Case.

In an Action upon the Case, the Plaintiff declared, That whereas the Plaintiff had sold to the Defendant 1000 couple of Newland Fishes to the use of the Defendant, and in consideration that he should ship, and should bring and carry the adventure of them from Bristol, in portum of Saint Lucar and should carry back again the value of the said Fish to London or Bristol secundum usum Mercatorum, The Defendant did promise, that upon the arrival of the said Fish, in portum of Saint Lucar, he would give to the Plaintiff 112 l. and said, that he arrived with the said Fish, ad portum of Saint Lucar, and that afterwards he arrived with goods of the value of the said Fish, ad portum of London, secundum usum Mercatorum. It was holden by all the Judges, that in portum, and ad portum is all one, as the Statute of Wast is, Quod vicecomes accedat ad locum vastatum, yet he ought to enter into the Land: So the Writ of accedas ad Curiam, & in plena Curia recordari facias, &c. Another Exception was, because he declared, That he returned with goods to the value, and doth not say, whose goods they were, but the Exception was not allowed, for these words secundum usum mercatorum imply that they were the goods of the Defendant, Quod fuit concessum per Curiam, and afterwards Indgement was given for the Plaintiff.

Assumpit.

Exposition of words.

Trin. 32 Eliz. In the Kings Bench.

CCCCLXIX. Walgrave and Agurs Case.

Sir William Walgrave brought an Action upon the Case against Agur. upon these words spoken by the Defendant to a servant of the Plaintiff, It is well known, that I am a true subject, but thou (invento the said servant) serbest no true subject, and thine own conscience may accuse thee thereof. It was moved in arrest of Judgement, That these words are not actionable, for no slander comes to the Plaintiff thereby, for perhaps the Party served no man, but the Queen, and if the words may receive such sense, which

Action for scandalous words.

page and
of the Case.

is no pregnant proof of infamy, they are not actionable, as in the Case be-
twixt Savage and Cook, These words; Thou art not the Queens friend
are not actionable, for it might be they were spoken in respect of some ordi-
nary misdemeanours, as in not payment of Subsidies, or the like: Also it
is not averred, that the party to whom the words were spoken, was the
Plaintiffs servant. Coke, Where a man is touched in the duty of his office, or
in the course of life, an Action lieth, although that otherwise the words are
not actionable, and here is set forth in the Declaration. That the Plaintiff
at the time of the speaking of the said words, was a Justice of Peace, and
Sheriff of Suffolk, and Captain of a Troop of 120 Horse to attend the Preser-
vation of the Queens person: So in respect of place & dignity in the Common
wealth, as 2 H. 8. The Bishop of Winchester brought an action upon the
Statute of Scandal. Magnatum, upon these words, My Lord of Winchester
sent for me, and imprisoned me, untill I made a Release to J.S. and in re-
spect of his Place and Dignity the words were holden actionable: and 9 E-
liz. Dyer, In an action upon the Case by the Lord Aburgavenny against
Wheeler, My Lord of Aburgavenny sent for us, and put some of us into the
Coal-house, and some into the Stocks, and me into a place in his house cal-
led Little Case, and the words were holden actionable: So in our Case,
Lewes said, It was the Case of one Kinsey; one said to a Bailiff of a fran-
chise, Thou dost execute false Warrants, without saying, they were falsified
by him, adjudged an Action did not lie. Wray Chief Justice, These words
in themselves are not actionable, for the Plaintiff might be untrue in small
things, which gave no discredit, but the quality of the person of whom they
were spoken, may adde weight to them, as to call one Bankrupt generally,
no action lieth upon it, but to call a Merchant so is actionable. So to call one
Papist, no action lieth for it; But if one calls the Archbishop of Canterbury
so, an action will lie, for he is Governour of the Church. Thou art an
untrue man to the Queen, gives not an action to an ordinary Subject, but
such words spoken of one of the Privy Councell, are actionable. Corrupt
man, in themselves are not actionable, but being spoken of a Judge, an ac-
tion lieth. It was Birchleys Case, an Attorneys of this Court, Thou art a
corrupt man, and dealest corruptly, and it was adjudged per Curiam, that the
words were actionable, for that referres to his calling. Gawdy was of opi-
nion, that the words were actionable of themselves, without respect had to
the Quality of the person of whom they were spoken, for the words are par-
ticular enough, and to touch him in the duty of a Subject, which is to be
faithfull to his naturall Prince, is a great Reproach and Slander. Fennor
conceived, that the words were not actionable, VVray, as before, Of them-
selves they are not actionable, for they are in generall, for if he be indicted
of Trespasse, he is not a good Subject.

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